



**Mohamed Mohamed Moalin t/a Gaab Transporter Limited v Landlord & another (Environment and Land Appeal 45 of 2021) [2022] KEELC 13628 (KLR) (11 October 2022) (Ruling)**

Neutral citation: [2022] KEELC 13628 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA  
ENVIRONMENT AND LAND APPEAL 45 OF 2021  
LL NAIKUNI, J  
OCTOBER 11, 2022**

**BETWEEN**

**MOHAMED MOHAMED MOALIN T/A GAAB TRANSPORTER  
LIMITED ..... APPELLANT**

**AND**

**SALLY OYERA MOHAMED LANDLORD ..... 1<sup>ST</sup> RESPONDENT  
IGARE AUCTIONEERS ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

**I. Preliminaries.**

1. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents herein – Sally Oyera Mohammed Land Lord and Igare Auctioneers - moved this Honorable Court through filing of the Notice of Motion application by the 1<sup>st</sup> and 2<sup>nd</sup> Respondent dated 15<sup>th</sup> February, 2022 for its determination. The application filed on 25th February, 2022 was brought pursuant under the Provisions of Order 40 Rule 3(1), Order 51 Rule 1 of the *Civil Procedure Rules, 2010* and Section 3A of the *Civil Procedure Act*, Cap.21 of the Laws of Kenya.

**II. The 1<sup>st</sup> & 2<sup>nd</sup> respondent's case**

2. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents/Applicants herein in this application sought for the following orders:-
  - a. That the Appellant be found guilty of contempt of court for disobedience of this Court orders made on 13<sup>th</sup> October 2021 and committed to Civil Jail for six (6) months or such other period as this court may deem fit and just in the circumstances.
  - b. Costs of this application be in the cause.



3. The application is presumed on the grounds, testimonies and the averments made out under the 11 Paragraphed Supporting Affidavit of Sally Oyera Mohamed sworn and dated on 15<sup>th</sup> February, 2022 and the three (3) annexures marked as “SOM – 1 to 3” annexed thereto.
4. She deponed being the 1<sup>st</sup> Respondent/ Landlord herein thus competent and duly authorized by the 2<sup>nd</sup> Respondent to swear the affidavit. She informed Court that on 13<sup>th</sup> October, 2021, and in the presence of both Counsels for the parties herein this court ordered the Appellant to deposit a sum of Kenya Shillings One Million (Kshs 1,000,000/-) in the joint names of the Advocates for both parties herein within a period of thirty (30) days from the date of the said ruling thereof. According to the Deponent, the Appellant did not comply with the afore stated orders, on 15<sup>th</sup> November, 2021 he was granted a further Seven (7) days but again failed to comply.
5. She averred that despite all the gracious concession granted to him by this Court, there was no reason or any explanation given at all for the Appellant’s blatant disobedience of the court orders. She informed Court that, rather than complying with the Court Order, on 19<sup>th</sup> December, 2021, the Appellant hurriedly vacated the suit premises and carried away all the distrained goods which had been and remained proclaimed for attachment by the Auctioneers (as per copy of Auctioneers). She attached the annexure marked as “SOM – 1” being copy of the Auctioneers Proclamation Form.
6. She further deponed that as a result of the conduct by the Appellant, Advocate for the Respondent/ Applicant wrote to the Appellant’s Advocates on record appraising them on all the above matters without eliciting any reply whatsoever as per the copy she attached marked “SOM – 2”. She averred that from the onset, it was very clear and in black and white that the Appellant had blatantly disobeyed the court order and even gone ahead to spit on it by vacating the suit premises to ensure maximum disobedience and impunity. The Appellant’s acts were disrespectful of this court and he should be punished for the same so as to restore the respect and dignity of this court, the Constitution 2010 and the Rule of Law.
7. She stated that considering all the circumstances of this case and in the interest of justice and the provisions of the law and the Constitution 2010 this application should be allowed accordingly. Otherwise the Claimant would suffer substantial and irreparable loss and be condemned unheard for mistake beyond her control. In conclusion, she held that considering all the above facts and circumstances of this case and the law and justice of the matter the tenant’s application should be dismissed with costs.

### III. The appellant’s response

8. On 7<sup>th</sup> March, 2022 while opposing the said application by the 1<sup>st</sup> & 2<sup>nd</sup> Respondents herein, the Appellant filed its 11 Paragraphed Replying Affidavit sworn by Mohamed Mohamed Moalin and dated on even date. He confirmed being the Appellant herein and this competent to swear the affidavit on its behalf.
9. He deponed that the contents of the Respondents supporting Affidavit (herein referred to as the Affidavit) had been read to him by his Advocates on record to which he responded as herein. In response to contexts under Paragraph 2 of the affidavit. He averred that he had not been served with any court order by the Respondent and he put the Respondent to strict proof of the same.
10. He deponed that the issuance of stay orders pending appeal was conditional on him paying a sum of Kenya Shillings One Million (Kshs 1,000,000/-) into a joint account operated by all the Advocates on record. He was aware that failure to pay a sum of Kenya Shillings One Million (Kshs 1,000,000/-) as ordered by the Honourable Court was that he would not be granted stay pending appeal. He averred



that he had been advised by his Advocate on record that filing an appeal did not operate as a stay of execution. Therefore, he opined that the Respondent was at liberty to execute the under the orders of this court in accordance with the provisions of the Civil Procedure Act, Cap. 21 as opposed to filing the instant application.

11. He further deposed that, as far as he was aware this Honorable Court did not issue any orders barring him from vacating the suit property and in the event there was any such order the same had not been served upon him. He denied being in contempt of any orders issued by this Honourable Court and the Respondent was put to strict proof of any allegations of contempt. The Respondent/ Applicant by filing the said Application was attempting to execute against the Appellant rather than following the procedures stipulated by the law.
12. He deposed that the instant application was frivolous, an abuse of the court process and should therefore be dismissed.

#### **IV. The submissions**

13. On 11<sup>th</sup> May, 2022 upon all the parties appearing before it, the court directed that the said Notice of Motion application dated 15<sup>th</sup> February, 2022 be disposed of by way of written submission and provided proper timelines to that effect. Pursuant to that, 11<sup>th</sup> May, 2022 all parties had fully complied and a ruling date was set to be on notice.

#### **A. Written Submissions by the 1<sup>st</sup> & 2<sup>nd</sup> Respondents.**

14. On 11<sup>th</sup> May 2022 the advocate for the Respondents the Law Firm of Messrs. Mutisya & Associates filed their written submissions. M/s. Mwanyika Advocate submitted that the Application was dated 15<sup>th</sup> February 2022. The Applicant sought the prayers that the Appellant be found guilty of contempt of court for disobedience of this court orders made on 13<sup>th</sup> October 2021 and committed to civil jail for six (6) months or such other period as this court may deem fit and just in the circumstances and for the costs of the application to be in the cause.
15. The Learned Counsel submitted that the application was based on the following grounds. These were, firstly, that on 13<sup>th</sup> October 2021 and in the presence of both counsels for the parties herein this court ordered the Appellant to deposit a sum of Kenya Shillings One Million (Kshs 1,000,000/-) in the joint names of the Advocates for both parties herein within thirty (30) days.
16. Secondly, the Appellant did not comply with the orders and on 15<sup>th</sup> November 2021, he was granted a further Seven (7) days but again failed to comply. No reason or any explanation was given at all for the Appellant's blatant disobedience of the court orders.
17. On 19<sup>th</sup> December 2021, the Appellant hurriedly vacated the suit premises and carried away all the proclaimed and distrained goods which had been remained attached by the Auctioneers. The Respondent's Advocates wrote to the Appellants Advocates on all the above matters without receiving any reply whatsoever.
18. The Learned Counsel submitted that from the above onset it was very clear and in black and white that the Appellant had blatantly disobeyed the court order and even gone a head to spit on it by vacating the suit premises to ensure maximum disobedience and impunity. The Appellant's acts were disrespectful of this court and he should be punished for the same so as to restore the respect and dignity of this court the Constitution 2010 and the Rule of law. Considering all the circumstances of this case and in the interest of justice and the provisions of the law and the Constitution 2010 this application



should be allowed accordingly otherwise the Claimant will suffer substantial and irreparable loss and be condemned unheard for mistake beyond his control.

19. The Learned Counsel submitted that the application was further supported by an annexed affidavit sworn by Sally Oyera Mohamed plus the exhibits and which were self-explanatory. The Appellant filed a Replying Affidavit on 7<sup>th</sup> March 2022 which was self explanatory.
20. The Learned Counsel submitted that the Appellant knew of the said orders. The Counsel felt that the Appellant was being dishonest for alleging that he had not been served with the orders. In saying so, she held that the Appellant under the averments made out under Paragraph 4 of the Replying Affidavit had stated that the stay order was conditional on him depositing Kenya Shillings One Million (Kshs 1,000,000/-) in a joint Advocates account. Additionally, the Counsel pointed out that again under Paragraph 5 of the Replying Affidavit, he had admitted by stating that:-

“I am aware the failure to pay the Kenya Shillings One Million (Kshs 1,000,000/-) as ordered by the Honourable Court”.

Furthermore, the Counsel argued that the order was made in the presence of both Counsels for the parties. Clearly, from these facts as an indication the Appellant was well aware and had full knowledge of the order. The Learned Counsel submitted that the Appellant was in contempt of the court order in that the Appellant even sought extension of the time to comply. The order was very clear and should be complied with as courts do not issue orders in vain. It was is the dignity and respect should be maintained at all times. It was not the Appellant to tell the court what to do that is failure to deposit results in lapse of the orders as he alleged.

21. The Learned Counsel, to buttress her point, referred Court to the case of *Oilfield Movers Limited v Zarara Oil and Gas Limited* [2019] eKLR where the Respondent had been ordered to deposit Bank guarantee or Deposit shall be in the sum of 600,705.30 within 45 days. Upon the failure to do so, the Applicant applied for contempt of court. The court held that the law had changed and as it stood today, just having knowledge of the Court order superseded the personal service. Would the knowledge of the judgment or order by the Advocate of the alleged contemnor suffice for contempt proceedings?. We hold the view that it does. This was more so in a case such as this one where the advocate was in court representing the alleged contemnor and the orders were made in his presence.
22. The Learned Counsel submitted that in the matter before court, the Counsel for Zahara became aware of the court order on 31<sup>st</sup> July 2019 when the ruling was delivered and Zahara is deemed to have become of the order on the same day unless it was shown that it was impossible for the advocate to immediately communicate the order to his client. The law as restated in the case of “Shimmers (supra) was that knowledge of a court order on the part of a litigant could be inferred from knowledge of the order by the Advocate appearing for the party.
23. It was the Learned Counsel’s submission that the court stated that “....it bears repeating that there is uncontested evidence that counsel for Zahara was unaware of the court order on 31<sup>st</sup> July 2019 when the ruling was delivered. What the Respondents have failed to do is to do provide evidence of the lack of means or financial inability of Zahara to meet the terms of the court order. The Respondents face a serious allegation that they are in willful disobedience of a court. To escape liability, they need to place succinct evidence that the disobedience is not intentional but because of reasons beyond their control. Little, indeed no effort has been made in this regard. The upshot is that the judge found that Zahara Oils & Gas Limited, Peter Nduru and John Patrick Barr are in contempt of Court for disobedience of the court order issued on 31<sup>st</sup> July 2019”. The Notice of motion was dismissed.



24. In conclusion and the given circumstances, the 1<sup>st</sup> and 2<sup>nd</sup> Respondents prayed for their application to be allowed as prayed.

## **B. Written Submission by the Appellant**

25. On 9<sup>th</sup> May 2022 the Learned Counsel for the Appellate, the Law Firm of Messrs. Yunis Ali & Co filed their written submissions. Mr. Yunis Advocate submitted that before the court was an application dated 15<sup>th</sup> February, 2022 seeking the following prayers that the Appellant be found guilty of contempt of court for disobedience of this court orders made on 13<sup>th</sup> October, 2021 and committed to civil jail for six (6) months or such other period as this court may deem just and fit in the circumstances and that the costs of the application be in the suit.
26. The Learned Counsel submitted that their issues were whether any court orders were served on the Appellant, whether there was an order by this Honourable Court barring the Appellant from vacating the suit premises and whether the Appellant is in contempt.
27. The Learned Counsel on the issue of whether any court orders were served on the Appellant submitted that the Respondent/Applicant had not furnished the Honourable Court with any evidence that the orders of this Honourable Court directing the Appellant. He argued that there was no return of service indicating that the Appellant was served with the orders which formed the crux of the Respondent's Application.
28. The Learned Counsel submitted that it was trite law that personal service of orders and a penal notice were a requirement in contempt of court proceedings. They made reference to the court of Appeal decision of *Nyamongo and another v Kenya Ports and Telecommunication Corporation* 1994 KLR1 and *Ochono & another v Okombo & 4 others* (1989)KLR 165.
29. The Learned Counsel submitted that the Applicant had failed to set out fully the grounds on which the application was made and identify each alleged act of contempt and be supported by affidavit containing the evidence relied referring to the holding in the case of *Christine Wangui Gachege v Elizabeth Wanjiru Evans & 11 others*.
30. The Learned Counsel contended that the threshold of proof required in contempt proceedings was higher than in normal civil cases as contempt proceedings involve matters concerning a person's liberty making reference to the case of "Mwangi H.C. Wagandu v Nairobi County Commissioner Nairobi Civil Appeal No 95 of 1998 where the court held:-
- “That the threshold of proof required in contempt of court is higher than that in normal civil cases, and one can only be committed to civil jail or otherwise penalized on the basis of evidence that leaves no doubt as to the contemnor's culpability.
31. The Learned Counsel referred to the case of *Re Bramblevale Limited* (1970) ICH 128 where Lord Denning stated, *inter alia*:-
- “Contempt of court is an offence of criminal character. A man may be sent to prison for it. It must be satisfactorily proved showing that when man was asked about it, he told lies. There must be some further evidence to incriminate him.”
32. The Learned Counsel submitted that pursuant to the provision of Section 107 of the *Evidence Act*, Cap. 80 – its on the one alleging that has to prove. Hence, the instant case, the onus of proving whether



the Appellant is in contempt lies solely at the feet of the Respondent/Applicant who has failed to demonstrated to the required threshold as provided in the case of “Mwangi H.C. Wangondu (Supra).

33. The Learned Counsel submitted that stay was granted to the Appellant on the condition that the Appellant was to deposit a sum of Kenya Shillings One Million (Kshs 1,000,000/-) into an account held by both advocates within 30 days. In this suit, it is clear that the stay was conditional on paying the said amount. Failure by the Appellant in paying the decretal amount as ordered by the court would render the order of stay impertinent. This Honourable Court in no certain times ordered that failure by the Appellant to pay the sum as ordered then the stay orders would have lapsed. The effect therefore was that the Applicant/ Respondent was at liberty to execute as provided in Order 22 of the *Civil Procedure Rules, 2010* or under the *Distress for Rent Act*. They referred to the case of *Kwach Group of Companies v Pindoria Holdings Limited* [2022] eKLR where Chitembe J. stated;

“the failure to comply with the Court orders has the automatic remedy of execution of decree as opposed to citation of the party in default for contempt or dismissal of the appeal. The Applicant has an effective remedy of effecting execution and the current application cannot be considered as proper remedy.”

34. The Learned Counsel submitted that as alleged by the Applicant there were no orders barring the Appellant from vacating the suit property. Therefore the Appellant was not in contempt of any orders touching on vacating the suit property. It was clear that the instant application was an attempt by the Applicant to levy distress by filing an application for contempt as opposed to following the provisions for execution. They concluded by asking the court to dismiss the application dated 15<sup>th</sup> February, 2022.

#### **V. Analysis and Determination**

35. I have carefully read and considered all the pleadings, the well-articulated written submissions by all the parties herein, the cited authorities and the relevant provisions of the law in reference to the Notice of Motion application dated 15<sup>th</sup> February, 2022 by the Respondents. To arrive at an informed decision, this Court has framed these four (4) issues for its determination. These are:-
- a. What is the meaning, Scope and nature of the Concept of the breach of Court Order and the Consequences thereof in Kenya?
  - b. Whether the Notice of Motion application dated 15<sup>th</sup> February, 2022 by the Respondent/ Applicant herein meets the fundamental threshold of breach of Contempt of Court by the Appellant?
  - c. Whether the parties are entitled to the relief sought.
  - d. Who will bear the costs of the application herein

#### **ISSUE No a). What is the meaning, scope and nature of the Concept of the breach of Court Order and the Consequences thereof in Kenya?**

36. Starting with the first issue under this sub - heading, I wish to first of all define the term “contempt”. The *Black’s Law Dictionary* (Ninth Edition) defines contempt of court as:-

“Conduct that defies the authority or dignity of a court. Because such conduct interferes with the administration of justice, it is punishable usually by fine or imprisonment.”



37. The latest edition of Brian A. Garner in [\*Black's Law Dictionary\*](#) (Eleventh Edition) Thompson Reuters, 2019 defines contempt of court as:-

“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 the proceedings or to impair the respect due to such a body.”

38. In the case of [\*Johnson v Grant\*](#) (1923) SC 789 at 790 Clyde LJ noted:-

“The phrase ‘contempt of court’ does not in the least describe the true nature of the class of offence with which we are here concerned.... The offence consists in interfering with the administration of the law; in impeding and perverting the course of justice..... it is not the dignity of court which is offended – a petty and misleading view of the issues involved, it is the fundamental supremacy of the law which is challenged.”

39. The law guiding the present Application is Order 40 Rule 3(1) of the [\*Civil Procedure Rules, 2010\*](#) which stipulates as follows:-

‘In cases 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.

40. In the case of [\*Woburn Estate Limited v Margaret Bashforth\*](#) [2016] eKLR the Court of Appeal held as follows:

”For many years in the history of the Judiciary of Kenya the Courts have, pursuant to section 5 (1) of the [\*Judicature Act\*](#), resorted to the prevailing law of England in the exercise of the power to punish for contempt of Court.....

Today that position has drastically changed, starting with the establishment of the Supreme Court which was not envisaged when Section 5 of the [\*Judicature Act\*](#) was enacted. By Act No7 of 2011, Article 163 (9) of the [\*Constitution\*](#) was operationalized by the enactment of the [\*Supreme Court Act\*](#) (CAP 9A), which among other things, makes express provision for the power of the Supreme Court to punish for contempt.

Under Section 29 of the [\*Environment and Land Court Act\*](#), it is an offence punishable, upon conviction to a fine of not exceeding Kenya Shillings twenty Thousand (Kshs 20,000,000) or to imprisonment for a term not exceeding two years, or to both, if any person refuses, fails or neglects to obey an order or direction of the Court given under the Act.

We have gone to this great length to demonstrate how, before the passage of these legislations the powers of the High Court and this Court to punish for contempt of Court were dynamic and kept shifting depending on the prevailing laws in England. Today each level of Court has been expressly clothed with jurisdiction to punish for contempt of Court. The only missing link is the absence of the rules to be followed in commencing and prosecuting contempt of Court Applications

41. The [\*Contempt of Court Act\*](#) commenced on the 13<sup>th</sup> January, 2017 but had been declared invalid by the High Court in the case of ”[\*Kenya Human Rights Commission v Attorney General & another\*](#) [2018]



- eKLR. I am therefore obliged to revert to the provisions of the law that operated before the enactment of the Contempt of Court of Act, to avoid a lacuna in the enforcement of Court's orders.
42. It was in this respect as observed in the case of "[Republic v Returning Officer of Kamkunji Constituency & The Electoral Commission of Kenya](#) HCMCA No 13 of 2008, that the High Court (read Environment and Land Court) has the responsibility for the maintenance of the rule of law, hence there cannot be a gap in the Application of the rule of law. In addition, in the case of "[Republic v Principal Secretary, Ministry of Defence Ex parte George Kariuki Waitbaka](#) [2019] eKLR, it was held that where there is a lacuna with respect to enforcement of remedies provided under the [Constitution](#) or an Act of Parliament, or if, through the procedure provided under an Act of Parliament, an aggrieved party is left with no alternative but to invoke the jurisdiction of the Court, the Court is perfectly within its rights to adopt such a procedure as would effectually give meaningful relief to the party aggrieved, in exercise of the inherent jurisdiction granted to the Court by the provision of Section 3A of the [Civil Procedure Act](#), Cap. 21 to grant such orders that meet the ends of justice and avoid abuse of the process of Court.
43. Under the provision of Section 5(1) of the [Judicature Act](#) which provided that:
- “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.”
44. In the case of "[Hadkinson v Hadkinson](#) (1952) 2 All ER. 567, it was held that:
- “It is plain and unqualified obligation of every person against or in respect of, who 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.” (Also see the case of [Katsuri Limited v Paurchand Depar Shah](#) (2016) eKLR).
45. I agree with the holding in the above mentioned decisions. It is well settled that every court order should to be obeyed by the person to it is directed. One obeys it, regardless of whether it was irregular, and then raises a challenge to it, and unless it is set aside, it has to be obeyed.
46. The power to punish for contempt of Court, in courts of this level, is provided for under the Section 5 of the [Judicature Act](#), Chapter 8 of the Laws of Kenya. A number of other legislations provide for the power to punish for contempt of Court. There exists an avalanche of case law on the powers of the Court to punish such conduct. I will not go to the history and import of the entire process and reasons behind the exercise of such power but it is rich in history. However, it is work noting that under the parent statute that establishes this Court, power is given to it to punish for the offence of contempt of Court. Under the provision of Section 29 of the [Environment and Land Court](#) No 19 of 2011 is clear to the effect that;
- “Any person who refuses, fails or neglects to obey an order or direction of the Court given under this Act, commits an offence, and shall, on conviction, be liable to a fine not exceeding twenty million shillings or to imprisonment for a term not exceeding two years, or to both
47. In the case of [Charity Mpano Ntiyine v China Communication Constructions Company Limited & National Environment and Management Authority](#) (2017) eKLR. Court held that there are three elements that must be proved in contempt proceedings. These are:-
- a. Applicant must demonstrate terms of orders



- b. Applicant must demonstrate knowledge of terms by the Respondents and
  - c. Applicant must demonstrate failure of Respondent to comply with the court order.
48. Under the provision of Order 40 Rule 3 of [Civil Procedure Rules, 2020](#) provides that cases of disobedience or of breach of any terms of a temporary injunction the court granting that 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 of not exceeding six (6) months unless the court directs his release.

The reason why courts punish for contempt is to uphold the dignity and authority of the court, ensure compliance with directions of the court observance and respect of due process of law, preserve an effective and impartial system of justice and maintain public confidence with administration of justice by court. Without sanctions of contempt there would be a serious threat to the rule of law and administration of justice for a party to be cited for contempt he must have violated and/or disobeyed an order that was directed at him.

49. The Honorable Court has been compelled to rely on the decision of:- [Christine Wangari Gachege v Elizabeth Wanjiku Evans & 11 others](#) Civil No 3 of 2013 and In the [Gatharia Mutitika v Baharini Farm Limited](#) Civil Appeal No 24 of 1985 where it was held inter alia:-

“A contempt of court is an offence of Criminal Character a man may be sent to prison. The standard of Proof in contempt proceedings must be higher than proof on a balance of probabilities almost but not exactly beyond reasonable doubt. The guilt of a Contemptor has to be proved with strictness of proof as it is consisted with the gravity of charge”.

50. In a matter of placing more emphasis onto the expected legal ingredients of Contempt of court, this Court has further relied on the decision of [Sheila Cassatt Issenberg & another v Antony Machatha Kinyanjui](#) [2021] eKLR, the court held that:-

“.....in cases of Contempt the guilt has to be proved with such strictness of proof as is consistent with the gravity of the charge... Recourse ought not to 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 party of the judge 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... 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 contempt is alleged to 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”.

51. It is an established principle of law as was held in the case of:- [Kristen Carla Burchell v Barry Grant Burchell](#), Eastern Cape Division Case No 364 of 2005 in order to succeed in civil contempt proceedings, an 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.



**ISSUE No b). Whether the Notice of Motion application dated 15<sup>th</sup> February, 2022 by the Respondent/Applicant herein meets the fundamental threshold of breach of Contempt of Court by the Appellant?**

52. Having laid the basis for understanding why courts in Kenya can punish for contempt of court orders, I now turn to address the issues raised in the Application and the necessary pleadings. In order to find out whether the application was merited, three quick important points need to be considered first: was there an order to be obeyed? If so, was it served? If the answer to the two is in the affirmative, was it obeyed? As I stated in the introduction to this ruling, the Application relates to alleged disobedience of a court order issued on 13<sup>th</sup> October, 2021. The Applicant asked this Court to cite the Appellant/Respondent for contempt of the order. The order was issued in the interim and the Court directed that the matter was to be mentioned on 15<sup>th</sup> November, 2021. The orders were to be in place from the date of issue to 15<sup>th</sup> November, 2021 when they were extended again for Seven (7) days.
53. In the instant case, the Applicant's case is that the Appellant/Respondent in the present of all parties involved in this suit, the Honorable court gave an order on 13<sup>th</sup> October, 2021 but disobeyed and disregarded the same willfully and deliberately. On the contrary, the Appellant/Respondent denies service or even knowledge thereof and contends that he was not in contempt of Court. The Appellant further submitted that the application before court it is clear that the instant application is an attempt by the Applicant to levy distress by filing an application for contempt as opposed to following the provisions for execution.
54. There is no doubt that on the 13<sup>th</sup> October, 2021, the Court sat for the purposes of giving directions on an application dated the 20<sup>th</sup> August, 2021 which sought stay orders from execution of a ruling delivered on 30<sup>th</sup> July, 2021 in respect to the Tenant's proclaimed goods/ tools of trade.
55. The Court did not issue an ex - parte interim order of the Applicant's Application as both parties were present when the orders were given by this Honorable court, where this Court ordered:- "that Interim orders granted to the Appellant's on prayer no. 2 of the Notice of Motion dated 20<sup>th</sup> August, 2021 were extended to 15<sup>th</sup> November, 2021 for the sake of the balancing of scales of justice and under Order 42 Rule 6(1)(2) and Order 6 of the *Civil Procedure Rules* direct that there be deposited a sum of Kshs 1,000,000/- in a fortnight....." To this end, as the author of that said order, I find that indeed there was a valid order issued by this Court upon which a complaint of disobedience has been raised by the Applicant.
56. On the issue of whether the Appellant herein was served with or were made aware of the court order issued in court on 13<sup>th</sup> October, 2021, I find that as a general rule, no order of Court requiring a person to do or abstain from doing any act may be enforced (by committing him/her for contempt) unless a copy of the order has been served personally on the person required to do or abstain from doing the act in question, or that the person had the knowledge of an order which supersedes personal service. On this line of argument, it is important to note that the orders were given in Court on 13<sup>th</sup> October, 2021 in the presence of both the Appellate and the Respondents. For this reason why would the Applicant go through the trouble of serving a party that was in court when the said orders were granted after all it was a date reserved to prosecute the Appellant's Notice of Motion when orders when conditional orders were granted against him. This court finds that the Appellant had knowledge of the court's orders and therefore personal service was therefore unnecessary. In my view, the application fully satisfies the ingredient warranted for citing a Contemptor for contempt of Court.



### **ISSUE No c). Whether the parties are entitled to the relief Sought.**

57. Under this Sub heading, I am guided by the Scottish case of *Stewart Robertson v Her Majesty's Advocate*, 2007 HCAC 63, Lord Justice Clerk stated that:

“contempt of court is constituted by conduct that denotes willful defiance of or disrespect towards the court or that willfully challenges or affronts the authority of the court or the supremacy of the law, whether in civil or criminal proceedings”

59. Further, Romer L.J in *Hadkinson v Hadkinson*(1952) ALL ER 567 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”

60. From the foregoing, it is trite that contempt of court proceedings and applications are subtle and criminal in nature and would impose criminal sanctions if a conviction followed. I find that the Appellant/Respondent defied orders of this Court despite having knowledge of the said orders. The Respondents are indeed entitled to all the remedies sought from their application.

61. To protect the dignity and authority of the court of law, this court, shall be firm on any person who deliberately disobeys court orders or attempts to scuttle the court process.

### **Issue 3: Who will bear the costs**

62. The issue of costs is at the discretion of the Court. Costs mean the award that a party is given after the conclusion of any legal action, process or proceeding of any litigation. The provision of Section 27(1) of the *Civil Procedure Act* holds that costs follow the events. By event it means the results or outcome of the said legal action, process or proceedings thereof.

63. In this case the Respondents/Applicants have succeeded in prosecuting their application. Therefore, it follows that they deserve the orders of costs to be borne by the Appellant.

### **IV. Conclusion & Disposition**

64. Ultimately, after conducting an indepth and elaborate analysis of the framed issues hereof, the Honorable Court is of the strong view that the Respondents/Applicants have been able to successfully establish their case on preponderance of probability. Thus, in view of the foregoing and for avoidance of doubt I do order as follows:-

- a. That the Notice of Motion application dated 15<sup>th</sup> February, 2022 by the Respondents/Applicants herein be and is hereby allowed with costs.
- b. That the Appellant/Respondent herein be and is found guilty for being in contempt of Court orders and proceed to punish him for the said offence of contempt.
- c. That taking that the interim orders granted to the Appellant were conditional on him paying a sum of Kenya Shillings One Million (Kshs 1,000,000/-) which he failed to pay be and are hereby vacated henceforth.



- d. That the Appellant/Respondent be and is condemned to serve Civil Jail term of four (4) months effectively and/or in the alternative to immediately pay up the Respondent herein a sum of Kenya Shillings One Million Five Hundred Thousand (Kshs 1,500,000/-).
- e. That costs of the application to be borne by the Appellant.

It is so ordered accordingly.

**RULING DELIVERED, SIGNED AND DATED AT MOMBASA VIRTUALLY THIS 11<sup>TH</sup> DAY OF OCTOBER 2022.**

**HON. JUSTICE L.L NAIKUNI, (JUDGE)**

**ENVIRONMENT AND LAND COURT, AT MOMBASA**

**In the presence of:-**

- a. M/s. Yumna/Mr. Omar – the Court Assistants.
- b. Mr. Abdi Advocate for the appellant
- c. M/s. Mwanyika Advocate for the Respondent.

