



**Republic v Principal Kadhi, Mombasa; Patel (Interested Party); Dar & 3 others (Respondent)  
(Judicial Review 90 of 2020) [2024] KEELC 705 (KLR) (6 February 2024) (Ruling)**

Neutral citation: [2024] KEELC 705 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA  
JUDICIAL REVIEW 90 OF 2020  
LL NAIKUNI, J  
FEBRUARY 6, 2024**

**BETWEEN**

**REPUBLIC ..... APPLICANT**

**AND**

**PRINCIPAL KADHI, MOMBASA ..... RESPONDENT**

**AND**

**MURTAZA TURABALI PATEL ..... INTERESTED PARTY**

**AND**

**ALIBHAI ADAMALI DAR ..... RESPONDENT**

**SHABBIR ALIBHAI DAR ..... RESPONDENT**

**ZAINULABIDIN YUSSUFALI DAR ..... RESPONDENT**

**YAKUTA ALIHUSEIN DAR ..... RESPONDENT**

**RULING**

**I. Introduction**

1. The Honorable Court was called upon to make determination over the Notice of Motion application dated 24<sup>th</sup> July, 2023. It was brought by the Applicant - Murtaza Turabali Patel under the provisions of Article 48 and 159 (2) of the Constitution of Kenya, 2010, Section 27 (b) and 28 of the Contempt of Court Act No 46 of 2016 and Sections 1A, 1B, 3, 3A and 63 (e) of the Civil Procedure Act. Cap.21 Laws of Kenya and Order 51 Rule 1 of the Civil Procedure Rules 2010.
2. Upon service, and while opposing the Notice of Motion application dated 24<sup>th</sup> July, 2023, the 4<sup>th</sup> Respondent herein, Yakuta Alihusein Dar responded to the same through filing Replying Affidavit dated 28<sup>th</sup> September, 2023.



## II. The Applicant's case

3. The Applicant sought for the following orders:-
  - a. That the Respondent Yakuta Alihassen Dar ,Alibhai Adamali Dar, Shabbir Alibhai Dar and Zainulabidin Yussufali Dar by herself/ agents/Servants/employee be and are hereby cited for contempt of the Order issued on the 6<sup>th</sup> March, 2023 and be committed to civil prison for such period as this Honourable Court may deem fit and just. In that, the said Yakuta Alihassen Dar , Alibhai Adamali Dar, Shabbir Alibhai Dar and Zainulabidin Yussufali Dar have jointly and severally by her self-disobeyed the Orders made herein by this Honourable Court on the 6<sup>th</sup> March, 2023.
  - b. That the Honourable Court do proceed and issue orders be committed to civil jail for a period of Six (6) months.
  - c. That an order that the costs of these contempt proceedings be borne by the said Yakuta Alihassen Dar ,Alibhai Adamali Dar, Shabbir Alibhai Dar and Zainulabidin Yussufali Dar.
4. The Application was based on the grounds, testimonial facts and averments made out by the 7 Paragraphed Supporting affidavit sworn by Murtaza Turabali Patel , the Applicant herein on 24<sup>th</sup> July, 2023 and two (2) annexures marked as “MTP – 1” and “MTP - 2” annexed hereto. He averred that:-
  - a. He was the Applicant in this matter and hence competent to swear this Affidavit.
  - b. This Honorable Court issued an Order on the 6<sup>th</sup> March, 2023 over this matter. [Annexed in the affidavit and marked as “MTP - 1(a)1(b)” was a copy of Court Order and copy of letter dated 13<sup>th</sup> June, 2023]
  - c. The Respondent - Yakuta Alihassen Dar ,Alibhai Adamali Dar, Shabbir and the 6<sup>th</sup> March, 2023 had shown disdain and was likely to bring disrepute to this Honourable Court.
  - d. Alibhai Dar and Zainulabidin Yussufali Dar herein referred to as the Court's order as they acted with disdain by invading and evicted the Applicant from the suit land premise and giving it to Third Parties.
  - e. The said Yakuta Alihassen Dar , Alibhai Adamali Dar, Shabbir Alibhai Dar and Zainulabidin Yussufali Dar (hereinafter referred to as “the Respondents), despite being aware, and/or informed of this Honourable Court's order she had acted with disdain by moving from one flat to the other and in the process damaging, and/or vandalized those units. [Annexed in the affidavit and marked as “MTP - 2” were photographs of the Vandalism]
  - f. The Applicants had no other way of enforcing the said order.
  - g. The Respondents actions were in toto violation of the Court order issued on the 6<sup>th</sup> March, 2023 which should only be enforced forthwith.
  - h. They were interfering with quite possession of the premises.
    - i. They were leasing/selling to third parties.



### III. The 4<sup>th</sup> Respondent's response to the Application

5. The 4<sup>th</sup> Respondent responded to the Notice of Motion application dated 24<sup>th</sup> July, 2023 by the Applicant. This was through a 12 Paragraphed Replying Affidavit sworn by Yakuta Alihusein Dar and dated the 28<sup>th</sup> September, 2023. The 4<sup>th</sup> Respondent stated as follows:-
- a. Her husband died on 9<sup>th</sup> July, 2019. He was not a party in this dispute. He was one of the nephews of the 1<sup>st</sup> Respondent Alibhai Adamali Dar and a cousin of the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents. They resided together in an apartment within Plot Number Mombasa/XXXII/27, Old Town, Mombasa.
  - b. As a preliminary point she asked the Honourable Court to subject the Applicant Murtaza Turabali Patel to psychiatric evaluation. She never believed that he was in his right mind. On ground number 2 of his application dated 24<sup>th</sup> July, 2023 he alleged that her 96-year-old uncle and her husband's cousins who were over 58 years old invaded him and evicted him from the suit prohibition. This was why there were no applications or orders for stay of execution in Judicial Review Proceedings brought under the Law Reform Act. Having found that a Kadhi's Court was not a Court within the meaning of the Civil Procedure Act or the Environment & Land Court Act, that finding could not be stayed so as to permit the Principal Kadhi to continue hearing applications within Succession proceedings under The Kadhi's Court Act, to enforce incompetent orders of injunction and to exercise jurisdiction he did not have.
  - c. Assuming that the Honourable Court granted any orders of injunction in April 2022 or that the Principal Kadhi granted valid orders of injunction on 25<sup>th</sup> November, 2020 any such orders expired in April 2023 in regard to these proceedings and in November 2021 in regard to the incompetent orders of the Principal Kadhi. Whichever way, the Honourable Court looked at the present application it was so incompetent and the worse abuse of process of Court. In the Motion dated 24<sup>th</sup> July, 2023 the Honourable Court was asked to deprive his clients of their liberty and to commit them to prison for a period of 6 months for alleged disobedience of your orders of 6<sup>th</sup> March, 2023 and to condemn them to pay the costs of the application. The orders the Honourable Court granted on 6<sup>th</sup> March, 2023 and her submissions thereon are:-
    - i. The Honourable Court granted a stay of execution of the Judgment but whoever drew Order 2 added his own things. Answer: Stay of execution was not a positive or negative order that could be disobeyed. Execution of Court orders and decrees were a function of Deputy Registrars of Superior Courts. There was no application for execution, there were no warrants and no execution proceedings before the Deputy Registrar.
    - ii. The Honourable Court permitted the Applicant to file and serve his Notice of Appeal out of time within 14 days from 6<sup>th</sup> March, 2023. Answer: No such order was capable of disobedience. His clients never prevented the Applicant from filing a Notice of Appeal which she in fact did on 15<sup>th</sup> March, 2023. So, there could not be any application for contempt based on that order.
    - iii. In order number 4 the Honourable Court imposed a condition upon the Applicant to deposit a sum of Kenya Shillings Two Hundred and Fifty Thousand (Kshs 250,000.00/=) within 30 days. Answer: That was not an order capable of disobedience.
    - iv. In order number 5 the Honourable Court directed that if sum of Kenya Shillings Two hundred and Fifty Thousand (Kshs 250,000.00/=) was not deposited within the time the Honourable Court prescribed the orders of stay of execution and leave to file the



Notice of Appeal out of time would automatically lapse. Answer: That was not an order capable of disobedience by the Respondents.

- d. The Honourable Court could clearly see that the application was poorly thought out and she had her own reservations on the qualifications and competence of the person who drew that Motion and got an ignorant Applicant to swear the Affidavit.
- e. The orders the Honourable Court granted on 6<sup>th</sup> March, 2023 arose from the Judgment the Honourable Court delivered on 4<sup>th</sup> April, 2022 and it was important to set out the Court's determination in Paragraphs 42 on pages 29 to 30 of that Judgment.
- f. The Honourable Court allowed Judicial Review by quashing the incompetent decision of the Principal Kadhi as he lacked jurisdiction. The Court prohibited the Principal Kadhi from taking any further steps in the matter.
- g. The Honourable Court dismissed the Applicant's Notice of Motion dated 14<sup>th</sup> July, 2021 in which he had sought orders of injunction against the clients. As the Honourable Court dismissed the application for injunction what orders of injunction could possibly be disobeyed by the clients and be the subject of the present application on alleged contempt?
- h. The effect of the orders the Honourable Court granted on 6<sup>th</sup> March, 2023 was that the orders of *Certiorari* and Prohibition were stayed, assuming that the orders of 6<sup>th</sup> March, 2023 were valid in view of the prohibition in the provision of Section 8 (3) of the *Law Reform Act*. The Respondents were neither enforcing the orders of *Certiorari* nor Prohibition. Those were self-enforcing because under the provision of Section 8 (3) they were final. The decision of the Principal Kadhi remained quashed and the Principal Kadhi was under the prohibition not to take any further steps in the proceedings.
- i. Under the provision of Section 8(3) of The *Law Reform Act*, stay of execution ought to have been sought from the Court of Appeal and not from this Honourable Court.
- j. When the Honourable Court ordered stay of proceedings. By so doing, the Honourable Court never granted orders of injunction which the Court had already declined. The Deponent referred to the contents made out under Paragraphs 38, 39, 40 and 41 of the Judgment which this Honourable Court delivered on 4<sup>th</sup> April, 2022. In particular, she referred to the determination in Paragraph 40 (c) from that Judgment. The Court could not be invited to punish the Respondents for allegedly disobeying non-existent orders of injunction.
- k. The orders the Honourable Court granted on 6<sup>th</sup> March, 2023 determined the Notice of Motion application by the Interested Party dated 17<sup>th</sup> May, 2022. He had sought stay of execution of the Judgment, leave to file Notice of Appeal out of time and an order that the Notice of Appeal be deemed as duly filed upon payment of requisite Court fees. The application never contained a prayer for any injunction and the Honourable Court never granted any orders of injunction on 6<sup>th</sup> March, 2023. Without trivializing any attempt at disobeying valid Court orders, while relying on the her the averments made out in Replying Affidavit and the submissions on the grounds in the Notice of Motion application dated 24<sup>th</sup> July, 2023 and the unsworn Supporting Affidavit of the Interested Party, she responded as follows:-
  - a. In ground Number 1, the Interested Party alleged that the Respondents had shown disdain and was likely to bring disrepute to the Honourable Court. No details or particulars were given.



- b. Ground No 2 contained an allegation that the Respondents had acted in disdain by invading and evicting the Applicant from the suit premises and giving it to third parties. The alleged third parties was not identified. The Interested Party was not evicted and was still living with his problematic wife in the suit premises.
- c. Ground No 3 was that the Applicant had no other way of enforcing the said order. There were no orders capable of enforcement.
- d. Ground No 4 was that the Respondents had violated the orders issued on 6<sup>th</sup> March, 2023. No details were given.
- e. Ground No 6 was that the Respondents had leased or sold the suit premises to third parties. He never named the third parties although he lived in the same apartment.
- f. Ground No 7 was a repetition of ground No 3.
- l. There was no Affidavit of service of the orders given on 6<sup>th</sup> March, 2023.
- m. While the Honourable Court could not punish Advocates for incompetence, the Court has express jurisdiction under the provision of Section 56 of The Advocates Act to punish the Applicant's Advocates for gross abuse of process of Court for assisting his client in swearing of the false Affidavit, assuming the affidavit was sworn in the first place.
- n. The 4<sup>th</sup> Respondent urged the Honourable Court to find that the Application was misconceived, incompetent, vexatious, frivolous, a gross abuse of process of Court and was based on Court orders that ought not to have been granted. The Honourable Court had seen from the Replying Affidavit that the Interested Party may not be in his right state of mind and the 4<sup>th</sup> Respondent suggested that the Honourable Court could issue an express order requiring him to submit to psychiatric evaluation before he filed any further applications. The Honourable Court may also order costs to be paid by Marende Necheza & Company Advocates on the basis that the Interested Party may not be of sound mind and would not have had capacity to issue instructions.
- o. Under the current rules the Honourable Court had the power to assess costs. They had been forced to deal with two (2) applications after Judgment and the present one was worse than the former. The Honourable Court had seen that one of the Respondents was over 90 years old while the others were in their 60s. The Interested Party wished to drive all these elderly people to an early grave as they could not handle the pressure that pertained to multiple applications and in particular an application by which a mad man wished to have his 96-year-old uncle put into prison for a period of 6 months.

#### **IV. The Supplementary Affidavit of the Applicant**

- 6. With the leave of Court, the Applicant, Murtaza Turabali Patel filed a 17 Paragraphed Supplementary Affidavit to the application dated 27<sup>th</sup> October, 2023 where he averred that:-
  - a. Further to what he had deponed on the 24<sup>th</sup> July, 2023, he reiterated that the suit premises had six (6) apartments constituting 3 bedroom-2 apartment and 2 bedroom 4 apartments.
  - b. Ms. Yakuta occupied 1 three-bedroom house and 2 bedroom 2 flats which she shifted on in the year 2021 from the two flats which was turned into one by the 3<sup>rd</sup> Respondent house who had shifted and moved to Nyali.



- c. In response to the contents made out under Paragraphs 6 of the 4<sup>th</sup> Respondent's had stated that the Respondents were her uncle, cousins respectively which was not true. She married the late Amirali Adamali Dar's son, who was deceased and who was in the suit in Kadhi's court and Magistrates court. So she was not part of his family. She was a trespasser who wanted to usurp his property by claiming it as hers.
- d. The apartments were occupied as follows by the Respondents: Alibhai Dar (1<sup>st</sup> Respondent)-3-bedroom house occupied only himself and was not the owner of the property. Shabbir Dar (Alibhai son)-2-bedroom house for 4 people and they were also not the owner. Zainul Dar - currently living in Nyali but had leased the property to one Yakuta Dar - occupied Zainul Dar's house plus the two apartment which is used to lease to the outside parties such as community guest in return of financial gain and also used by the servant's if not used by the community. One two bedroom was being occupied by the Applicant himself.
- e. In her affidavits, the 4<sup>th</sup> Respondent claimed that she stayed in one apartment with the 1<sup>st</sup> and 2<sup>nd</sup> Respondents' but as per his knowledge and because he resided in the suit premises, the 4<sup>th</sup> Respondent used 3 apartments by herself and one child.
- f. She further claimed that Murtaza Patel (the registered owner) was not of sound mind. He would like her to tender proof of such heinous accusations and the mental torture to Murtaza Turabali Patel (the registered).
- g. He took great exception to the content of the said unfortunate statement which had heinous justice from the Respondents as he was of sound mind and this was just a form of bullying and intimidation.
- h. Yakuta Dar had sub - let her former house to Zainul Dar and was getting financial gain from that sublet.
- i. The 4<sup>th</sup> Respondent stated in her affidavit that he mentioned her allegedly Uncles and cousins but he only mentioned her because she was the one shifting from one house to another destroying the previous house.
- j. They had complied with the orders of this Honourable Court by depositing a sum of Kenya Shillings Two Hundred and Fifty Thousand (Kshs 250,000.00/-) in Court. Annexed and marked as "MTP - 3" was a copy of the receipt.
- k. In response to the contents of Paragraph 12 of the 4<sup>th</sup> Respondent's Affidavit whereof she alleged that her uncles, and cousin were in their 60s and 90s and could not handle the pressure, the Applicant was also in his 60s and ailing from hypertension and cholesterol.
- l. Her uncle and cousins were the one(s) who conspired with the Respondents to intimidate him to leave the suit property to them through constant harassment by the Police.
- m. The 3<sup>rd</sup> Respondent was a registered Estate agent. His firm was called Gigi & Company. It had been in existence for over 50 years and the 4<sup>th</sup> Respondent have a real estate company called Pearl Real Estate Company and the virtue of being in business in the world of real estate they should know the property laws and just because they were cousins and uncle never made them the owners of the property.
- n. He requested the Honourable Court to take a keen look into the Respondents Replying Affidavit and take action against it accordingly because it only constituted intimidation and bullying by the Respondents.



- o. On the 4<sup>th</sup> October, 2023 Mr. Shabbir Alibhai Dar and Yakuta Dar - the 2<sup>nd</sup> and 4<sup>th</sup> Respondents herein brought Police officer whereof they were arrested and placed in the Police custody. Annexed and marked as “MTP - 4” was a copy of a letter to the ODPP.

## V. Submissions

7. On 19<sup>th</sup> September, 2023 while all the parties were present in Court, they were directed to have the Notice of Motion application dated 24<sup>th</sup> July, 2023 be disposed of by way of written submissions. Pursuant to that, all the parties obliged and a ruling date was reserved on Notice by the Honourable Court accordingly.

### A. The written submissions of the Respondents

8. The Respondents through the Law firm of Messrs. Kinyua Muyaa & Company Advocates filed their written submissions dated 28<sup>th</sup> September, 2023. Mr. Kinyua Advocate commenced his submissions by stating that the Motion dated 24<sup>th</sup> July, 2023 arose from the Ruling and orders delivered by this Honourable Court on 6<sup>th</sup> March, 2023 staying the execution of the decree. Right away there was a serious problem with those orders. The Learned Counsel averred that under the provision of Section 8 (3) of the Law Reform Act upon which the Court derives the Judicial Review jurisdiction, the orders of *Certiorari*, *Mandamus* and Prohibition were final in nature but only subject to the right of appeal. There could be no return made on those orders and no pleadings in prohibition shall be allowed after the Judgment. In a nutshell, when the Honourable Court delivered the Judgment on 4<sup>th</sup> April, 2022, the Court became “functus officio” as the law expressly prohibited any return to the same Court. The orders given on 6<sup>th</sup> March, 2023 were therefore per in curium, had no force of law and could not be enforced by contempt of Court proceedings.
9. He submitted that the provision of Section 8(3) of The Law Reforms Act made perfect sense. Once a Judge granted an order of *Certiorari* which quashed a decision of an inferior jurisdiction the Judge could not “un-quash” it. And upon granting an order of Prohibition he could not “un-prohibit” it or suspend the prohibition. This was why there were no applications or orders for stay of execution in Judicial Review Proceedings brought under the Law Reform Act. Having found that a Kadhi's Court was not a Court within the meaning of the Civil Procedure Act or the Environment & Land Court Act, that finding could not be stayed so as to permit the Principal Kadhi to continue hearing applications within Succession proceedings under The Kadhi's Court Act, to enforce incompetent orders of injunction and to exercise jurisdiction he does not have.
10. The Learned Counsel submitted that assuming that the Honourable Court granted any orders of injunction in April 2022 or that the Principal Kadhi granted valid orders of injunction on 25<sup>th</sup> November, 2020 any such orders expired in April 2023 in regard to these proceedings and in November 2021 in regard to the incompetent orders of the Principal Kadhi. Whichever way the Honourable Court looked at the present application it was so incompetent and the worse abuse of process of Court.
11. In the Notice of Motion application dated 24<sup>th</sup> July, 2023 the Honourable Court was asked to deprive his clients of their liberty and to commit them to prison for a period of 6 months for alleged disobedience of this Court's orders of 6<sup>th</sup> March, 2023 and to condemn them to pay the costs of the application. The orders the Honourable Court granted on 6<sup>th</sup> March, 2023 and her submissions thereon were:-
  - i. The Honourable Court granted a stay of execution of the Judgment but whoever drew order 2 added his own things. Answer: Stay of execution was not a positive or negative order that



could be disobeyed. Execution of Court orders and decrees was a function of Deputy Registrars of Superior Courts. There was no application for execution, there was no warrants and no execution proceedings before the Deputy Registrar.

- ii. The Honourable Court permitted the Applicant to file and serve his Notice of Appeal out of time within 14 days from 6<sup>th</sup> March, 2023. Answer: No such order was capable of disobedience. His clients never prevented the Applicant from filing a Notice of Appeal which she in fact did on 15<sup>th</sup> March, 2023. So, there could not be any application for contempt based on that order.
  - iii. In order number 4 the Honourable Court imposed a condition upon the Applicant to deposit of a sum of Kenya Shillings Two Hundred and Fifty Thousand (Kshs 250,000.00/=) within 30 days. Answer: That was not an order capable of disobedience.
  - iv. In order number 5 the Honourable Court directed that if a sum of Kenya Shillings Two Hundred and Fifty Thousand (Kshs 250,000.00/=) was not deposited within the time the Honourable Court prescribed the orders of stay of execution and leave to file the Notice of Appeal out of time will automatically lapse. Answer: That was not an order capable of disobedience by the Respondents.
12. He asserted that the Honourable Court could clearly see that the application was poorly thought out and she had her own reservations on the qualifications and competence of the person who drew that Motion and got an ignorant Applicant to swear the Affidavit. The orders the Honourable Court granted on 6<sup>th</sup> March, 2023 arose from the Judgment this Court delivered on 4<sup>th</sup> April, 2022 and it was important to set out the Court's determination in under the contents of Paragraph 42 on pages 29 to 30 of that Judgment.
  13. He opined that the Honourable Court allowed Judicial Review by quashing the incompetent decision of the Principal Kadhi as he lacked jurisdiction. The Court prohibited the Principal Kadhi from taking any further steps in the matter. The Honourable Court dismissed the Applicant's Notice of Motion dated 14<sup>th</sup> July, 2021 in which he had sought orders of injunction against the clients. As the Honourable Court dismissed the application for injunction what orders of injunction could possibly be disobeyed by the clients and be the subject of the present application on alleged contempt?
  14. Further, the Learned Counsel averred that the effect of the orders the Honourable Court granted on 6<sup>th</sup> March, 2023 was that the orders of *Certiorari* and Prohibition were stayed, assuming that the orders of 6<sup>th</sup> March, 2023 were valid in view of the prohibition in the provision of Section 8(3) of the [Law Reform Act](#). The Respondents were not enforcing the orders of *Certiorari* and Prohibition. Those were self-enforcing because under the provision of Section 8 (3) they were final. The decision of the Principal Kadhi remained quashed and the Principal Kadhi was under the prohibition not to take any further steps in the proceedings.
  15. He submitted that under Section 8(3) of The [Law Reform Act](#), stay of execution ought to have been sought from the Court of Appeal and not from this Honourable Court. When the Honourable Court ordered stay of proceedings the Honourable Court never by doing so grant orders of injunction which the Court had already declined. She referred to the contents of Paragraphs 38, 39, 40 and 41 of the Judgment this Honourable Court delivered on 4<sup>th</sup> April, 2022. She referred in particular to the determination in paragraph 40(c) in that Judgment. The Court could not be invited to punish the Respondents for allegedly disobeying non - existent orders of injunction.
  16. The Learned Counsel submitted that the orders the Honourable Court granted on 6<sup>th</sup> March, 2023 determined the Notice of Motion application by the Interested Party dated 17<sup>th</sup> May, 2022. He had sought stay of execution of the Judgment, leave to file Notice of Appeal out of time and an order that



the Notice of Appeal be deemed as duly filed upon payment of requisite Court fees. The application did not contain a prayer for any injunction and you did not grant any orders of injunction on 6<sup>th</sup> March, 2023. Without trivializing any attempt at disobeying valid Court orders she relied on the her Replying Affidavit and the submissions on the grounds in the Motion dated 24<sup>th</sup> July, 2023 and the unsworn Supporting Affidavit of the Interested Party and responded as follows:-

- a. In ground Number 1, the Interested Party alleged that the Respondents have shown disdain and was likely to bring disrepute to the Honourable Court. No details or particulars were given.
  - b. Ground No 2 contained an allegation that the Respondents had acted in disdain by invading and evicting the Applicant from the suit premises and giving it to third parties. The alleged third parties were not identified. The Interested Party was not evicted and was still living with his problematic wife in the suit premises.
  - c. Ground No 3 was that the Applicant had no other way of enforcing the said order. There was no orders capable of enforcement.
  - d. Ground No 4 was that the Respondents had violated the orders issued on 6<sup>th</sup> March, 2023. No details were given.
  - e. Ground No 6 was that the Respondents had leased or sold the suit premises to third parties. He never named the third parties although he lives in the same apartment.
  - f. Ground No 7 was a repetition of ground number 3.
17. There was no Affidavit of service of the orders given on 6<sup>th</sup> March, 2023. While the Honourable Court could not punish advocates for incompetence, the Court has express jurisdiction under the provision of Section 56 of The *Advocates Act* to punish the Applicant's Advocates for gross abuse of process of Court for assisting his client in swearing of the false Affidavit, assuming the affidavit was sworn in the first place.
18. The Learned Counsel urged the Honourable Court to find that the Application was misconceived, incompetent, vexatious, frivolous, a gross abuse of process of Court and was based on Court orders that ought not to have been granted. The Honourable Court had seen from the Replying Affidavit that the Interested Party may not be in his right state of mind and the 4<sup>th</sup> Respondent suggested that the Honourable Court could issue an express order requiring him to submit to psychiatric evaluation before he filed any further applications. The Honourable Court may also order costs to be paid by Messrs. Marende Necheza & Company Advocates on the basis that the Interested Party may not be of sound mind and would not have had capacity to issue instructions.
19. In conclusion, the Learned Counsel submitted that under the current rules the Honourable Court had the power to assess costs. They had been forced to deal with 2 applications after Judgment and the present one was worse than the former. The Honourable Court had seen that one of the Respondents was over 90 years old while the others were in their 60s. The Interested Party wished to drive these elderly people to an early grave as they cannot handle the pressure that pertained to multiple applications and in particular an application by which a mad man wished to have his 96 - year-old uncle put into prison for 6 months.

## **VI. Analysis and Determination**

20. I have carefully read and considered the pleadings herein and the relevant provisions made by the by the Learned Counsels. In order to arrive at an informed, fair, reasonable and Equitable decision, the Honorable Court has framed two (2) broad issues for its determination. These are:-



- a. Whether the Respondents Yakuta Alihassen Dar , Alibhai Adamali Dar, Shabbir Alibhai Dar and Zainulabidin Yussufali Dar were in contempt of Court Orders issued on the 6<sup>th</sup> March, 2023 and be committed to civil prison for such period as this Honourable Court may deem fit and just?
- b. Who will bear the Costs of the Notice of Motion application dated 24<sup>th</sup> July, 2023.

**ISSUE No a). Whether the Respondents Yakuta Alihassen Dar , Alibhai Adamali Dar, Shabbir Alibhai Dar and Zainulabidin Yussufali Dar were in contempt of Court Orders issued on the 6<sup>th</sup> March, 2023 and be committed to civil prison for such period as this Honourable Court may deem fit and just**

21. The Honourable Court has deciphered that the main Substratum in this proceedings herein is one on Contempt of Court from an alleged breach and gross violation of the Court orders. It has ben stated on umpteenth times that Court orders are sacrosanct. They are not a formality nor cosmetic. They have to be obeyed however erroneos they maybe. The only remedy available is for an aggrieved party to revert back to Court seeking for either review or variation or setting aside or discharge of the said orders depending on the prevailing circumstance and surrounding facts and inferences. The consequences of disobedience of Court order is extremely serious as it borders on criminality capable of one forfeiting their fundamental rights and freedoms enshrined in the Bill of Rights under the Constitution.
22. The Black's Law Dictionary 11<sup>th</sup> Edition, defines contempt as:-
 

“The act or state of despising; the quality, state or condition of being despised. Conduct that defies the authority or dignity of a court or legislature. Because such conduct interferes with the administration of justice, it punishable by fine or imprisonment”.
23. At some initial point, the legal framework that governed contempt of court was the Contempt of Court Act until it's nullification in the case of:- “Kenya Human Rights Commission v Attorney General & another [2018] eKLR Constitutional Petition No 87 of 2017”.
24. However, the court in the case of:- “Samuel M. N. Mweru & others v National Land Commission & 2 others [2020] eKLR” while discussing the legal framework on contempt of court stated as follows:-
 

“The applicable law as regards contempt of court existing before the enactment of the Contempt of Court Act was restated by the Court of Appeal in Christine Wangari Gachege v Elizabeth Wanjiru Evans & 11 others, [2014] eKLR. In that case the Court found that the English law on committal for contempt of court under Rule 81.4 of the English Civil Procedure Rules, which deals with breach of Judgment, order or undertakings, was applied by virtue 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.”

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, and the requirement for personal service of court orders in contempt of Court proceedings is found in Rule 81.8 of the [English Civil Procedure Rules](#).”

25. As restated in the above case law, the law then applicable in contempt of court proceedings is Section 5(1) of the [Judicature Act](#) which mandates that the court relies on the applicable law in England at the time the alleged contempt is committed. In the case of “[Samuel M. N. Mweru](#) (*supra*) the Court dealing with an application for contempt of court based on disobeyed of a court order stated:

“An application under Rule 81.4 “(breach of judgement, order or undertaking) now referred to as “application notice” (as opposed to a notice of motion) is the relevant one for making the application now under consideration. The application notice must set out fully the grounds on which the committal application is made and must identify separately and numerically, each alleged act of contempt and be supported by affidavit(s) containing all the evidence relied upon”.

26. I reiterate that a claim on contempt of court is a grave issue that the court treats with a lot of seriousness as it goes to the core of undermining the authority of the court. It is a fundamental principle of law that court orders are meant to be obeyed to the letter as they are not issued in vain. Failure to obey court orders would then result in contempt of court.

27. The importance of obedience of court orders was restated in the case of “[Econet Wireless Kenya Limited v Minister for Information & Communication of Kenya & another](#) [2005] eKLR” where the court cited with approval the case of “[Gulabchand Popatlal Shah & another](#) Civil Application No 39 of 1990”, (unreported). The Court of Appeal held, *inter alia*,

“..... It is essential for the maintenance of the Rule of Law and good order that the authority and dignity of our courts are upheld at all times. This court will not condone deliberate disobedience of its orders and will not shy away from its responsibility to deal firmly with proved contemnors .....”

28. Fundamentally, courts need to ascertain whether the applicant herein has met the basic elements set out to prove a case for contempt of court. In the case of “[Katsuri Limited v Kapurchand Depar Shah](#) [2016] eKLR” as relied upon by the Respondents, the court stated that:

“The applicant must prove to the required standard (in civil contempt cases which is higher than in criminal 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.”



29. I will therefore be analyzing each element as set out above and in close application to the instant case. In so doing I will be looking at the court order issued by the court. The provision of Section 29 of the *Environment and Land Court* 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

30. 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 Respondents, (iii). Failure by the Respondent to comply with the terms of the order.

31. From the sworn affidavits, annexure’s, submissions by the respective parties’ Counsels on record, the applicable law and the decided cases, the following issues stand out for determination:-

- i. Whether there was a valid Court order issued by this Court on the 6<sup>th</sup> March, 2023 by this Honourable Court
- ii. Whether the Respondents herein were served with or was aware of the orders made on 6<sup>th</sup> March, 2023.
- iii. Whether the order as sought and extracted was clear and unambiguous
- iv. Whether the Respondents are guilty of contempt of Court order herein issued.

32. In the instant case, from the very onset and without mincing words, the Honourable Court outrightly states that it is not at all persuaded that there is any Contempt of Court committed by the Respondents as alleged by the Applicants for the following reasons:- Firstly, I hold that it is clear that the order issued by the court was clear and unambiguous. It was addressed to the Respondents, hence binding upon them. The Applicant’s case is that an order was made on the 6<sup>th</sup> March, 2023 by this Honourable Court where it opined itself as follows:-

- “ 1. That the notice of motion application dated 17<sup>th</sup> May, 2022 by the Interested Party/ Applicant herein be and is hereby found to have merit and is hereby allowed
2. That an order be made hereby issue granting stay of execution of the Judgment and subsequent Decree/ Order delivered on the 4<sup>th</sup> April, 2022.
3. That an order be made hereby issue granting the Interested Party/ Applicant leave to file and serve his draft Notice of Appeal out of time within the next fourteen (14) days from the date of the delivery of this ruling
4. That an order be and is hereby made for the Interested Party/ Applicant to place with this Court a Security for Costs of a sum of Kenya Shillings Two Hundred and Fifty Thousand (Kshs 250,000.00) within the next thirty (30) days from the date of the delivery of this Ruling.
5. That an order do hereby issue that failure to comply with (c) and (d) within the next fourteen (14) days of this ruling and Order (d) as stated herein, the



order herein will automatically lapse and the judgment and the decree of this Court delivered on 4<sup>th</sup> April, 2022 will take effect thereof.”

33. Secondly, on the alleged contemnors ought to have knowledge of or proper notice of the terms of the order. The Respondents had no knowledge of the court order as they were not in attendance when the ruling was delivered on 6<sup>th</sup> March, 2023.
34. I find that as a general rule, no order of Court requiring a person to do or to 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. There has been no proof that the said order was delivered to the Respondents or that service was effected of the order.
35. In the old celebrated case of “*Exparte Langely* 1879, 13 Ch D/10 (CA)” Thesiger L.J stated at P. 119 as follows:-

“...the question in each case, and depending upon the particular circumstances of each case, must be, was there or was there not such a notice given to the person who is charged with contempt of Court that you can infer from the facts that he had notice in fact of the order which has been made” And, in a matter of this kind, bearing in mind that the liberty of the subject is to be affected, I think that those who assert that there was such a notice ought to prove it beyond reasonable doubt.”
36. Thirdly, the allegations blatantly meted out by the Applicant to the effect that the Respondents have willfully disobeyed these orders and even went ahead to vandalize the suit property after the Honourable Court gave its orders on 6<sup>th</sup> March, 2023 have not been proved whatsoever. Further, that accusation that the Respondents willfully acted in contempt by not obeying this Court orders as this Honourable Court had made clear orders in terms of handling of the suit property remain as mere unproved assertions. Additionally, the Honourable Court fully concurs with the submissions made out by the Learned Counsel for the Respondents to the effect.
37. Fourthly, the Court fully concurs with the submissions rightfully made out on the proper legal position by the Learned Counsel for the Respondent to wit that:-
  - a. The Honourable Court granted orders on 6<sup>th</sup> March, 2023 arising from the Judgement this Court delivered on 4<sup>th</sup> April, 2022 whereby it allowed Judicial Review by quashing the incompetent decision of the Principal Kadhi as he lacked jurisdiction.
  - b. The Court prohibited the Principal Kadhi from taking any further steps in the matter. The Honourable Court dismissed the Applicant’s Notice of Motion dated 14<sup>th</sup> July, 2021 in which he had sought orders of injunction against the clients. As the Honourable Court dismissed the application for injunction there were no orders of injunction capable of being disobeyed by the Respondents and hence not subject of the present application on alleged contempt.
  - c. The effect of the orders the Honourable Court granted on 6<sup>th</sup> March, 2023 was that the orders of *Certiorari* and Prohibition were stayed and the Respondents were not enforcing the orders of *Certiorari* and Prohibition.
  - d. Those were self-enforcing because under the provision of Section 8 (3) they were final. The decision of the Principal Kadhi remained quashed and the Principal Kadhi was under the prohibition not to take any further steps in the proceedings.



- e. Under Section 8(3) of The Law Reform Act, stay of execution ought to have been sought from the Court of Appeal and not from this Honourable Court. When the Honourable Court ordered stay of proceedings the Honourable Court never by doing so grant orders of injunction which the Court had already declined. The Court could not be invited to punish the Respondents for allegedly disobeying non-existent orders of injunction.
38. To this end, therefore, the Honourable Court is not satisfied that the Applicant has proved its case for contempt of Court orders by this Honourable Court given on 6<sup>th</sup> March, 2023 against the Respondents.
39. On the 3<sup>rd</sup> issue for determination as to whether the order as sought and extracted was clear and unambiguous, I find that pursuant to the issuance of the order for parties as herein above captioned, the said order, was only on the stay of execution orders for the Judgment delivered on 4<sup>th</sup> April, 2022. Clearly from this Court's ruling on 6<sup>th</sup> March, 2023 there was nothing ambiguous or unclear that was not stated and the parties were not all present in Court. The Applicant has argued that the Respondents had gone contrary to the orders of the Court. The Court of Appeal in "Shimmers Plaza Limited v National Bank of Kenya Limited [2015] eKLR" emphasized that:-
- “It is important however, that the Court satisfies itself beyond any shadow of a doubt that the person alleged to be in contempt committed the act complained of with full knowledge or notice of the existence of the order of the Court forbidding it. The threshold is quite high as it involves possible deprivation of a person's liberty.”
40. As stated above, contempt proceedings are of a criminal nature and involve, if proved, loss of liberty. The Applicants must therefore endeavor to prove all facts relied on by way of evidence beyond reasonable doubt. In the end, it is the finding of this Honourable Court that the Applicant had not proved to the required standard that the Respondent as cited were in brazen disobedience of the Court orders issued by this Honourable Court on 6<sup>th</sup> March, 2023.

**ISSUE No e). Who will bear the Costs of Notice of Motion application dated 24<sup>th</sup> July, 2023.**

41. It is now well established that the issue of Costs are at the discretion of the Court. The Black Law Dictionary defines cost to mean:-
- “the expenses of litigation, prosecution or other legal transaction especially those allowed in favour of one party against the other”
42. In other words, Costs mean the award a party is awarded at the conclusion of a legal action or proceedings in any litigation. The provision of Section 27 of the Civil Procedure Act, Cap. 21 grants the High Court discretionary power in the award of costs which ordinarily follow the event unless the Court for good reasons orders otherwise. Section 27 (1) of the Civil Procedure Act provides as follows:-
- “(1) Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid; and the fact that the court or judge has no jurisdiction to try the suit shall be no bar to the exercise of those powers: Provided that the



costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order.”

43. A careful reading of the provision of Section 27 indicates that it is considered trite law that costs follow the cause/event, as described by Sir Dinshah Fardunji Mulla in his book *The Code of Civil Procedure*, 18<sup>th</sup> Edition, 2011 reprint 2012 at 540, is that costs must follow the event unless the court, for some good reasons, orders otherwise.
44. Additionally, the provision provides for ‘costs of and incidental to all suit or application’ which expression includes not only costs of suit but also costs of application in suit as described by *Mulla (supra)* at 536. Furthermore, Rtd. Justice Richard Kuloba in his book *Judicial Hints on Civil Procedure*, 2<sup>nd</sup> Edition, 2005 at 95 notes that the words ‘the event’ means the result of all the proceedings incidental to the litigation. Accordingly, the event means the result of the entire litigation. The order as to costs as provided for under section 27 remains at the discretion of the court.
45. The award of costs is therefore not cast in stone but courts have ultimate discretion. In exercising this discretion, courts must not only look at the outcome of the suit but also the circumstances of each case. In “*Morgan Air Cargo Limited v Everest Enterprises Limited* [2014] eKLR” the court noted that;
- “The exercise of the discretion, however, depends on the circumstances of each case. Therefore, the law in designing the legal phrase that “Cost follow the event” was driven by the fact that there could be no “one-size-fit-all” situation on the matter. That is why section 27(1) of the *Civil Procedure Act* is couched the way it appears in the statute; and even all literally works and judicial decisions on costs have recognized this fact and were guided by and decided on the facts of the case respectively. Needless to state, circumstances differ from case to case.”
46. In this case, as this Honourable Court has opined above, the Applicant has not convinced the Court that the Respondents were in contempt of Court orders issued by this Honourable Court on 24<sup>th</sup> July, 2023. Therefore the costs of the application are awarded to the Respondents for having participated in the hearing and determination of this application.

## VII. Conclusion & Disposition

47. In long analysis, the Honorable Court has carefully considered and weighed the conflicting parties’ interest as regards to balance of convenience. Clearly, the Applicant has no case against the Respondents. Having said that much, there will be need to preserve the suit land in the meantime. In a nutshell, I proceed to make the following orders:-
- a. That the Notice of Motion application dated 24<sup>h</sup> July, 2023 by the Applicant be and is hereby found to lack merited and hence dismissed in its entirety.
  - b. That this Honourable Court hereby does not find the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> & 4<sup>th</sup> Respondents namely, Alibhai Adamali Dar, Shabbir Alibhai Dar, Zainulabidin Yussufali Dar and Yakuta Alihusein Dar respectively being in contempt of Court Orders given on 6<sup>th</sup> March, 2023 as the Applicant has not proved to this Honourable Court that the order dated 30<sup>th</sup> March, 2023.
  - c. That the Orders of Court issued on 6<sup>th</sup> March , 2023 and the Court order dated 30<sup>th</sup> March, 2023 should be served to the Respondents herein within seven (7) days of this ruling.
  - d. That the Applicant shall pay the costs of the Notice of Motion application dated 24<sup>th</sup> July, 2023 to the Respondent.



It is so ordered accordingly.

**RULING DELIVERED VIA MICROSOFT TEAMS VIRTUAL MEANS, SIGNED AND DATED  
AT MOMBASA THIS 6<sup>TH</sup> DAY OF FEBRUARY 2024.**

.....

**HON. MR. JUSTICE L. L. NAIKUNI**

**ENVIRONMENT AND LAND COURT AT MOMBASA**

Ruling delivered in the presence of:

- a. M/s. Yumna, the Court Assistant;
- b. No appearance for the Applicant
- c. No appearance for the Respondents

