



**Equity Traders Limited v John & 2 others; Bazalel (Plaintiff); Mukindia & another (Defendant)
(Environment & Land Case E005 of 2024) [2024] KEELC 1668 (KLR) (4 April 2024) (Ruling)**

Neutral citation: [2024] KEELC 1668 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE E005 OF 2024**

**JO MBOYA, J
APRIL 4, 2024**

BETWEEN

EQUITY TRADERS LIMITED PLAINTIFF

AND

MARGRET KAMENE JOHN 1ST DEFENDANT

CAROLINE KAROKI 2ND DEFENDANT

HEZI BAZALEL 3RD DEFENDANT

AND

HEZI BAZALEL PLAINTIFF

AND

GEORGE IRERI MUKINDIA DEFENDANT

ANCENT MAKAU MUUTU DEFENDANT

RULING

Introduction and Background

1. The Defendants/Applicants herein have approached the Honorable Court vide Notice of Motion Application dated the 8th of February 2024, brought pursuant to (sic) the provisions of Section 39 of the High Court Organization and Administration Act, 2015; Section 5 of the *Judicature Act*; Rule 39 of the High Court; [Organization] General Rules 2016 and the inherent Jurisdiction of the court and in respect of which the Applicant has sought for the following reliefs:

i.Spent.



- ii. An order be issued to Equity Traders Ltd, George Ileri Mukinda and Ancent Makau Muutu to Show Cause why they should not be punished for Contempt of court by willfully disobeying the orders of this court issued on 18th January 2024.
 - iii. An order be issued citing Equity Traders Ltd, George Ileri Mukinda and Ancent Makau Muutu for contempt of this court's orders issued on the 18th of January 2024.
 - iv. This Honorable Court be pleased to issue an order committing George Ileri Mukinda and Ancent Makau to Civil jail for a period of six months for contempt of court by willfully disobeying the orders of this court issued on the 18th of January 2024.
 - v. The Honorable court be pleased to issue an order against George ilerer Mukinda and Ancent Makau Muutu to pay a fine of Kes. 300,000/= only each, as penalty for being in contempt of court by willfully disobeying the order of this court issued on 18th January 2024.
 - vi. This court be pleased to issue an order of sequestration, attachment and sale of personal properties against the contemnors for being in contempt of court by willfully disobeying the orders of this court issued on the 18th January 2024.
 - vii. This Honorable Court directs the Regional police commander to provide the Defendants with reasonable security to ensure the peaceful compliance with and enforcement of the orders of this court.
 - viii. The Honorable Court be pleased to issue such further or other orders as it may deem just and convenient.
 - ix. Cost of the Application be provided for.
2. The instant Application is premised and anchored on various grounds which have been enumerated in the body thereof. Nevertheless, the instant Application does not [sic] indicate that same is supported by any affidavit or at all.
 3. Be that as it may, a Supporting Affidavit sworn on the 8th of February 2024; has been filed alongside the subject Application and to which the deponent thereof has reproduced and reiterated the grounds contained and/or alluded to in the body of the application beforehand.
 4. Upon being served with the subject Application, the Plaintiff/Respondent as well as the alleged contemnors filed a Replying Affidavit sworn on the 16th of February 2024; and in respect of which, the Deponent has alluded to inter-alia; that the photographic evidence attached to the supporting affidavit are devoid of probative value insofar as same contravene the provisions of Section 106B of the Evidence Act, Chapter 80 Laws of Kenya.
 5. Additionally, it is instructive to note that the Defendants/Applicants herein subsequently sought for and obtained Leave to file a Further Affidavit and in this regard, a Further Affidavit sworn by one Caroline Karoki was filed. For good measure, the Further Affidavit was sworn on the 26th of February 2024.
 6. On the other hand, it suffices to point out that the instant Application came up for Hearing on the 20th of February 2024; when the advocate for the respective Parties covenanted to canvass and ventilate the application by way of written submissions. Consequently and in this regard, the court proceeded to and circumscribed the timelines for the filing and exchange of the written submissions.



7. For coherence, the Defendants/Applicants thereafter proceeded to and filed written submissions dated the 26th of February 2024; whereas the Plaintiff/Respondent and [sic] the contemnors filed written submissions dated the 4th of March 2024.

8. For the sake of completeness, both set of written submissions are on record.

Parties' Submissions:

a. Applicants' Submissions:

9. The Applicants' herein filed written submissions dated the 26th of February 2024; and in respect of which same [Applicants] have adopted and reiterated the grounds contained at the foot of the application as well as the averments contained in the body of (sic) the supporting affidavit sworn on the 8th of February 2024.

10. Furthermore, the Applicants herein have thereafter raised, highlighted and canvassed three [3] salient issues for due consideration and determination by the Honourable court.

11. Firstly, learned counsel for the applicants has submitted that the Honorable Court issued and granted various orders on the 18th of January 2024, inter-alia, an order for the maintaining of status quo over and in respect of the suit property, which is the subject of dispute between the parties herein.

12. Additionally, learned counsel has submitted that the orders of the court which were made on the 18th of January 2024, were clear, explicit and unequivocal and thus the terms thereof were understood by the parties, the Plaintiff/Respondent not excepted.

13. Other than the foregoing, learned counsel for the Applicants has also submitted that the orders under reference were made and/or rendered in the presence of Ms. Jackie Akinyi, learned counsel for the Plaintiff/Respondent and hence the terms and tenor of the orders were known to the Plaintiff/Respondent herein.

14. Consequently and in the premises, learned counsel for the Applicants has submitted that there can be no debate as to whether or not the Plaintiff/Respondent was knowledgeable of and privy to the terms of the orders of the court.

15. Secondly, learned counsel for the Defendants/Applicants has submitted that despite being privy to and knowledgeable of the order of the court, the Plaintiff/Respondent and her directors [the contemnors] have disobeyed and disregarded the terms of the said court orders. In this regard, learned counsel for the Applicants has invited the court to find and hold that the actions by and on behalf of the Plaintiff/Respondent and her directors constitute and amount to contempt of the court.

16. Based on the foregoing, learned counsel for the Applicants has therefore invited the Honourable Court to find and hold that the Plaintiff/Respondent and her directors are truly in contempt of the court and thus should be punished so as to uphold the dignity of the court and by extension, the rule of law.

17. In support of the foregoing submissions, learned counsel for the Applicants has cited and relied on inter-alia the holding in the case of Teachers Service Commission vs Kenya National Union of Teachers & 2 others (2013)eKLR; Nony Gathoni Njenga vs Jane Wambui Odewale & 2 others Civil Case No. 490 of 2013 (UR); Kenya Tea Growers Association vs Francis Atwoli & 5 others (2012)eKLR; Republic vs Kenya School of Law & 2 Others ex-parte Juliet Wanjiru Njoroge & 5 Others (2015)eKLR; Econet Wireless Kenya Ltd vs Minister for Information & Communication of Kenya & Another (2002)eKLR and Republic vs Ahmad Abolfathi Mohamed & Another (2018)eKLR, respectively.



18. Thirdly, learned counsel for the Applicants has submitted that the facts that the photographic evidence, which were attached to the supporting affidavit did not have the requisite electronic certificate, does not render the said evidence invalid and devoid of probative value.
19. To the contrary, learned counsel for the Applicants has submitted that the photographic evidence which has been attached to the supporting affidavit, has been verified by the Electronic Certificate which was subsequently filed and annexed to the Further Affidavit sworn by the 2nd Defendant/Applicant.
20. In any event, learned counsel has submitted that the fact that the electronic certificate was filed and brought to court long after the photographic evidence had been tendered, does not negate and/or defeat the validity of the said photographs.
21. Other than the foregoing, learned counsel for the Applicants has also submitted that the lack of the electronic certificate, as provided for by the provisions of Section 106B of the *Evidence Act*, Chapter 80 Laws of Kenya; is a technical and procedural defect, which is curable by dint of Article 159(2)(d) of *the Constitution* 2010.
22. Premised on the foregoing, learned counsel for the Applicant has therefore submitted that the Application beforehand is meritorious and thus same ought to be allowed essentially with a view to protecting the dignity and protecting of the court.

b. Respondent's Submissions:

23. The Respondents herein filed written submissions dated the 4th of March 2024; and in respect of which same [Respondents] have adopted and reiterated the contents of the Replying Affidavit and thereafter highlighted three [3] pertinent issues for consideration by the court.
24. First and foremost, learned counsel for the Respondent has submitted that even though the Defendants/Applicants sought for and obtained Leave to file and serve a Further Affidavit, the Further Affidavit for which leave was sought for and obtained ought to have been filed by the same deponent who had hitherto filed the Supporting Affidavit and not otherwise.
25. Nevertheless, learned counsel for the Respondent has submitted that upon procuring and obtaining Leave, the Further Affidavit was filed by Caroline Karoki [the 2nd Defendant/Applicant], who was not the deponent of the principal affidavit. In this regard, learned counsel for the Respondent has submitted that the purported further affidavit is therefore improper, invalid and illegal.
26. Secondly, learned counsel for the Respondent has submitted that the photographic evidence which have been attached/annexed to the supporting affidavit sworn by the 3rd Defendant/Applicant are invalid and illegal, insofar as same are not accompanied by the requisite Electronic Certificate in accordance with the provisions of Section 106B of the *Evidence Act*, chapter 80 Laws of Kenya.
27. In support of the foregoing submissions, learned counsel for the Respondents has cited and relied on inter-alia the holding in the case of John Lokitari Lodinyo vs IEBC & 2 Others (2018)eKLR and Richard Nyagaka Tony vs IEBC & 2 Others (2013)eKLR, respectively.
28. Thirdly, learned counsel for the Respondents has submitted that insofar as the Application beforehand seeks to cite and punish the Plaintiff/Respondent and her directors for contempt of court, it was incumbent upon the Applicants to tender and place before the court credible evidence to demonstrate (sic) the contempt complained of.



29. Further and in any event, learned counsel for the Respondent has submitted that where an Applicant impleads contempt, same [Applicant] is called upon to prove the claim for contempt to the requisite standard and not otherwise.
30. Be that as it may, learned counsel for the Respondent has submitted that the Applicants beforehand have neither established nor proved the allegations touching on contempt to the requisite standards or at all.
31. In support of the foregoing submissions, learned counsel for the Plaintiff/Respondent has cited and relied on the holding in the case of *Odando & Another vs National Environment Management Authority & 2 Others* [Environment and Land Petition No. 43 of 2019] [2023] KEELC 21431 (KLR) (9th November 2023).
32. Arising from the foregoing submissions, learned counsel for the Respondent has therefore implored the court to find and hold that the Application beforehand is devoid of merits and thus ought to be dismissed.

Issues for Determination:

33. Having appraised and reviewed the Application beforehand and the Response thereto; and upon taking into consideration the written submissions filed by and on behalf of the parties, the following issues emerge [arise] and are thus worthy of determination:
 - i. Whether the Application beforehand is legally incompetent or otherwise.
 - ii. Whether the photographic evidence [photographs] attached to the Affidavit of the 3rd Defendant/Applicant are legally admissible or otherwise.
 - iii. Whether the Applicants herein have proved the Complaints pertaining to contempt to the requisite standards or at all.

Analysis and Determination:

Issue Number 1 - Whether the Application beforehand is legally incompetent or otherwise.

34. The Applicants herein took out and filed the Notice of Motion Application dated the 8th of February 2024 and in respect of which same have sought for a plethora of reliefs, essentially touching on and/or concerning contempt of court.
35. It is instructive to note that where one, the Applicants not excepted, raise and/or canvass the plea of contempt like in the instant case, then same [Applicants] are called upon to tender and place before the court plausible and cogent evidence to demonstrate the plea of contempt.
36. Suffice it to point out that the requisite evidence that underpins the plea of contempt is ordinarily contained vide a Supporting Affidavit, which is mentioned in the body of the Application and thereafter annexed thereto. For good measure, other than alluding to the affidavit, same must accompany the Notice of Motion Application.
37. Nevertheless, in respect of the instant Application, it is worthy to note and point out that though same [application] has alluded to and enumerated the various grounds at the foot thereof, there is no gainsaying that the Application beforehand has neither alluded to nor mentioned that same is supported by any designated affidavit.



38. For coherence, the body of the subject Application does not implead and/or allude to the fact that the Application beforehand is premised on and/or supported by any affidavit or at all. Instructively, the body of the Application is silent on whether or not there is a supporting affidavit.
39. Be that as it may, it is worthy to point out that some sort of affidavit, namely, supporting affidavit sworn by the 3rd Defendant/Applicant, has been filed alongside the subject Application. However, as pointed out in the preceding paragraph, the application does not allude to any affidavit or at all.
40. Worse still, the supporting affidavit sworn by the 3rd Defendant/Applicant and which was filed alongside the application beforehand does not allude to and/or contend that same is being made in support of (sic) the Application dated the 8th of February 2024 or otherwise.
41. Simply put, the Application dated the 18th of February 2024 does not advert to any supporting affidavit at all, and on the other hand, the supporting affidavit, which has been filed alongside same [Application], also does not allude to the application beforehand.
42. To my mind, there is a serious disconnect between the Notice of Motion Application and (sic) the Supporting Affidavit and hence there is no nexus to connect the two documents or at all.
43. In the absence of any nexus between the Notice of Motion Application and the Supporting Affidavit [which does not refer to the application at all], it is my finding and holding that the application beforehand is fatally deficient and otherwise legally incompetent.
44. Other than the foregoing, it also appropriate to mention that though the Defendants/Applicants sought for and obtained Leave to file a Further Affidavit and which Further Affidavit was duly filed, it is imperative to underscore that where Leave is sought for and obtained to file a further/supplementary affidavit, such leave does not provide a basis for the filing of an affidavit [whether christened as further or supplementary], by a person who had not filed a previous affidavit.
45. O[In my humble view, where Leave is sought to file a further affidavit [which separate and distinct from additional affidavit] then the further affidavit must be filed by the same deponent who had hitherto filed the initial supporting affidavit. For good measure, the further affidavit is sworn in furtherance of the previous affidavit and not otherwise. [See the provisions of Order 51 Rule 14(3) of The Civil Procedure Rules, 2010].
46. However, in respect of the instant matter, the Defendant/Applicant sought for and obtained leave to file a further affidavit but instead of procuring a further affidavit from the deponent who had sworn the principal supporting affidavit, same brought forth a further affidavit albeit sworn by a separate and distinct deponent.
47. To my mind, if the Defendants/Applicants had wanted to file an affidavit by a separate and distinct deponent [other than the deponent who had sworn the principal affidavit], then the Applicants ought to have been clear in their mind as to the nature of affidavit that was sought to be filed.
48. Be that as it may, it is import to underscore that a further/supplementary affidavit can only further and/or supplement a principal affidavit, which had been filed and not otherwise.
49. Consequently, where no requisite supporting affidavit has been filed, then one cannot advert to a further affidavit.
50. Arising from the foregoing, it is therefore my finding and holding that the Application beforehand which essentially seeks to have the Plaintiff/Respondent and her directors cited and punished for contempt, is fatally incompetent and deficient and thus courts striking out.



51. In a nutshell, my answer to issue number one [1] is that the subject Application, which does not advert to and/or highlight the existence of [sic] a Supporting Affidavit is incompetent.

Issue Number 2 - Whether the photographic evidence [photographs] attached to the affidavit of the 3rd Defendant/Applicant are legally admissible or otherwise.

52. Even though the court has found and held that the subject Application was not accompanied and/or supported by an Affidavit, it is still imperative to venture forward and consider whether the photographic evidence that were attached to [sic] the supporting affidavit sworn by the 3rd Defendant, would suffice.

53. To start with, I have pointed out elsewhere that there is a disconnect between the Application and [sic] the Supporting Affidavit filed before the court insofar as neither of the documents alludes to and/or adverts to the other.

54. Nevertheless, to the extent that some supporting affidavit was filed and photographs attached thereto, it behooves the court to venture forward and examine whether the impugned photographic evidence have any probative value or at all.

55. In my humble view, the provisions of Section 106B of the *Evidence Act*, Chapter 80 Laws of Kenya provides that whenever a person, the Applicants herein not excepted, desire[s] to bring forth and to rely on photographic/electronic evidence, then such evidence must be accompanied by an electronic certificate.

56. For coherence, the explicit and unequivocal text of the law is to the effect that the requisite electronic certificate [signed by the originator of the electronic evidence] must accompany the photographic evidence and not otherwise.

57. Nevertheless, in respect of the instant matter, though the deponent of the supporting affidavit has annexed assorted photographs [which are electronic evidence], same has however failed to generate and file the requisite electronic certificate alongside the photographic evidence.

58. Simply put, no electronic certificate was generated and filed together with the photographic evidence either as required under the law or at all. Instructively, the electronic certificate is required to accompany the photographic evidence.

59. To the extent that no electronic certificate as envisaged under Section 106B of the *Evidence Act*, Chapter 80 Laws of Kenya, was ever filed and/or attached to the impugned photographic evidence, there is no gainsaying that the impugned photographic evidence were thus rendered invalid, illegal and hence devoid of any probative value.

60. Consequently and in the absence of the requisite electronic certificate [which is a mandatory requirement of the law], the impugned photographic evidence which were exhibited as annexure HB-2 at the foot of paragraph 5 of the Supporting Affidavit sworn on the 8th of February 2024 are hereby expunged and removed from the record of the court.

61. To underscore the significance of the electronic certificate, whenever one, the Applicants not excepted, are desirous of relying on photographic evidence, it is imperative to cite and adopt the ratio in the case of *The Speaker, Kisumu County Assembly vs The Clerk, Kisumu Assembly Service Board & 6 Others* (2015)eKLR, where the Court of Appeal stated and held thus:



65. Section 106B of the *Evidence Act* states that electronic evidence of a computer recording or output is admissible in evidence as an original document “if the conditions mentioned in this section are satisfied in relation to the information and computer.”
66. In our view, this is a mandatory requirement which was enacted for good reason. The court should not admit into evidence or rely on manipulated (and we all know this is possible) electronic evidence or record hence the stringent conditions in sub-section 106B(2) of that Act to vouchsafe the authenticity and integrity of the electronic record sought to be produced. For ease of reference, we wish to reproduce Section 106B of the *Evidence Act* in its entirety:

- “106B Notwithstanding anything contained in this Act, any information
- (1) contained in an electronic record which is printed on a paper, stored, recorded or copied on optical or electro-magnetic media produced by a computer (herein referred to as computer output) shall be deemed to be also a document, if the conditions mentioned in this section are satisfied in relation to the information and computer in question and shall be admissible in any proceedings, without further proof or production of the original, as evidence of any contents of the original or of any fact stated therein where direct evidence would be admissible.
 - (2) The conditions mentioned in subsection (1), in respect of a computer output, are the following—
 - (a) the computer output containing the information was produced by the computer during the period over which the computer was used to store or process information for any activities regularly carried out over that period by a person having lawful control over the use of the computer;
 - (b) during the said period, information of the kind contained in electronic record or of the kind from which the information so contained is derived was regularly fed into the computer in the ordinary course of the said activities;
 - (c) throughout the material part of the said period, the computer was operating properly or, if not, then in respect of any period in which it was not operating properly or was out of operation during that part of the period, was not such as to affect the electronic record or the accuracy of its content; and
 - (d) the information contained in the electronic record reproduces or is derived from such information fed into the computer in the ordinary course of the said activities.
 - (3) Where over any period, the function of storing or processing information for the purposes of any activities regularly carried on over that period as mentioned in paragraph (a) of sub section (2) was regularly performed by computers, whether—



- (a) by combination of computers operating in succession over that period; or
 - (b) by different computers operating in succession over that period; or
 - (c) in any manner involving the successive operation over that period, in whatever order, of one or more computers and one or more combinations of computers, then all computers used for that purpose during that period shall be treated for the purposes of this section to constitute a single computer and references in these sections to a computer shall be construed accordingly.
- (4) In any proceedings where it is desired to give a statement in evidence by virtue of this section, a certificate doing any of the following—
- (a) identifying the electronic record containing the statement and describing the manner in which it was produced;
 - (b) giving such particulars of any device involved in the production of that electronic record as may be appropriate for the purpose of showing that the electronic record was produced by a computer;
 - (c) dealing with any matters to which conditions mentioned in sub-section (2) relate; and
 - (d) purporting to be signed by a person occupying a responsible position in relation to the operation of the relevant device or the management of the relevant activities (whichever is appropriate), shall be evidence of any matter stated in the certificate and for the purpose of this subsection it shall be sufficient for a matter to be stated to be the best of the knowledge of the person stating it.
- (5) For the purpose of this section, information is supplied to a computer if it is supplied thereto in any appropriate form and whether it is so supplied directly or (with or without human intervention) by means of an appropriate equipment whether in the course of activities carried on by any official, information is supplied with a view to its being stored or processed for the purpose of those activities, that information, if duly supplied to that computer, shall be taken to be supplied to it in the course of those activities.”

67. In relation to this case, the relevant conditions in that section are (a) if the computer output was recorded by a person having lawful control over the computer used; (b) if the output was recorded in the ordinary course of that person’s activities using a computer or some other electronic devise and fed into a computer that was properly operating throughout the material period; and (c) if that person gives a certificate that to the best of his knowledge, the output is



an electronic record of the information it contains and describes the manner in which it was produced.

68. The *Evidence Act* does not provide the format the certificate required under sub-section 106B(2) thereof should take. The certificate can therefore take any form including averments in the affidavit of the recorder.
 69. In this case as we have said the electronic record was made by one Denis Kongo, a freelance photojournalist. He, however, did not annex to his affidavit sworn on 11th December 2014 the required certificate. The averments in that affidavit themselves did not meet the above stated threshold of sub-section 106B(2) of the *Evidence Act*. Those averments therefore fell short of the required certificate. In the circumstances, we agree with counsel for the appellants that the electronic evidence of Denis Kongo was inadmissible and the learned Judge erred in relying upon it.
62. Moreover, the peremptory significance of the electronic certificate as pertains to the admissibility of electronic evidence was also underscored by the Court of Appeal in the case of John Lokitare Lodinyo vs Independent Electoral and Boundaries Commission & 2 others [2018] eKLR, where the court stated and held thus:
54. Essentially, the sections provide that electronic evidence which is printed out shall be treated like documentary evidence and will be admissible without production of the computer used to generate the information. The appellant claimed that his technical team downloaded the forms and had them printed. He admitted that the forms were from the IEBC public portal. Ordinarily, this would have meant accessing the IEBC portal, which one could only do if they had access to the internet, proceeding to log onto the IEBC portal page, clicking on the Forms 35A uploaded on Kacheliba Constituency, downloading the Forms 35A onto the computer's hard disk and finally printing the documents via a printer connected to the computer.
 55. It is at this juncture that the provisions of section 106B of the *Evidence Act* come into play as the section sets out the conditions to be fulfilled to have this evidence admissible since evidence shall only be admissible if a certificate is presented identifying the electronic record and a description of the manner in which the electronic evidence was produced, together with any particulars of any device involved in the production of that document, which the appellant did not do. This Court in the case of County Assembly of Kisumu & 2 others v Kisumu County Assembly Service Board & 6 others [2015] eKLR stated that:

“Section 106B of the *Evidence Act* states that electronic evidence of a computer recording or output is admissible in evidence as an original document “if the conditions mentioned in this section are satisfied in relation to the information and computer.” In our view, this is a mandatory requirement which was enacted for good reason. The court should not admit into evidence or rely on manipulated (and we all know this is possible) electronic evidence or record hence the stringent conditions in sub-section 106B (2) of that Act to vouchsafe the authenticity and integrity of the electronic record sought to be produced...”
63. From the foregoing, there is no gainsaying that where an Applicant or such other litigant tenders before the court electronic evidence [photographic evidence] which is not accompanied by the requisite electronic certificate, then such evidence is devoid of probative value.
 64. Before departing from the issue herein, it is appropriate to disabuse learned counsel for the Applicant who is of the notion that insofar as a previous set of photographs had been tendered before the court at



the foot of the supporting affidavit sworn on the 17th of January 2024 and yet same were not objected to, then the current objection ought not to be upheld.

65. To my mind, the fact that the previous photographic evidence were not objected to on account of lack of the requisite electronic certificate, does not of necessity mean that the issue of law, which is potent and pertinent cannot be canvassed subsequently.
66. At any rate, the failure to raise and canvass such an objection at one point in time, does not bar and/or prohibit the adverse party from raising the objection. In any event, it is common knowledge that the doctrine of estoppel cannot be highlighted to defeat a clear and explicit provision of the law.
67. In short, it is my finding and holding that the impugned photographic evidence [photographs] which the Applicants had sought to rely upon, in an endeavor to demonstrate contempt, are illegal, invalid and thus devoid of probative value.

Issue Number 3 - Whether the Applicants herein have proved the complaints pertaining to contempt to the requisite standards or at all.

68. Having discussed the foregoing issues, [in terms of the preceding paragraphs] and having come to the conclusions highlighted herein before, it would have been appropriate to terminate the Ruling herein.
69. Nevertheless and for the sake of completeness, I propose to venture forward and to consider whether or not, the totality of the evidence/material placed before the court established the plea of contempt to the requisite standard as envisaged and required by the law.
70. Firstly, there is no gainsaying that any Applicant, the Applicants before the court not excepted, is required to place before the court plausible and cogent evidence to establish the complaints underpinning the allegations of contempt. Furthermore, contempt requires to be proved to a standard beyond the balance of probabilities [preponderance of probabilities]. For good measure, the Standard of Proof as pertain[s] to Contempt of Court has been highlighted to be the intermediate Standard.
71. To this end, it is important to adopt, restate and reiterate the ratio in the case of *Mututika vs Baharini Ltd (1995)eKLR*, where the court held thus:

In, *Re Breamblevale Ltd [1969] 3 All ER 1062*, Lord Denning MR. (as he then was), at page 1063, had this to say,

“A contempt of court is an offence of a criminal character. A man may be sent to prison. It must be satisfactorily proved. To use the time– honoured phrase, it must be proved beyond reasonable doubt”.

With the greatest possible respect to that eminent English judge, that proof is much too high for an offence “of a criminal character” and, ipso facto, not a criminal offence properly so defined.

We agree with Mr. Khaminwa’s submissions in this respect. In our view the standard of proof in contempt proceedings must be higher than proof on the balance of probabilities, almost but not exactly, beyond reasonable doubt. We envisage no difficulty in courts determining the suggested standard of proof. The standard of proof beyond reasonable doubt ought to be left where it belongs, to wit, in criminal cases. It is not safe to extend it



to offence which can be said to be quasi – criminal in nature Winn LJ on page 1064 was in our view right in saying that the guilt has to be proved

“with such strictness of proof ... as is consistent with the gravity of the charge ...”

72. Furthermore, the standard of proof attendant to complaints pertaining to contempt was also highlighted by the court in the case of *Woburn Estate Limited versus Margaret Bashforth* [2016] eKLR, where the court held as hereunder:

‘We reiterate that contempt proceedings being of quasi –criminal in nature and since a person may lose his right to liberty, each stage and step of the procedure must be scrupulously followed and observed. We bear in mind the often-cited passage attributed to Lord Denning In *Re Bramblevale Ltd* [1970] 1 CH 128 at page 137 that;

“ A 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 the man was asked about it, he told lies. There must be some further evidence to incriminate him.”

73. Having taken cognizance of the foregoing position and essentially the requisite standard of proof attendant to the plea of contempt, it is now worthy to revert back and discern [decipher] whether the Applicants herein have met the said standard.
74. To begin with, the only evidence that was tendered and placed before the court towards proving the plea of contempt were the impugned photographs which were annexed to the affidavit sworn by the 3rd Defendant/Applicant on the 8th of February 2024. However, it is not lost on the court that the said photographs were found to be devoid of probative value.
75. Nevertheless and for the sake of arguments only, even assuming that the said photographic evidence were to be taken into account towards proving the plea of contempt, same would still be incapable of meeting the set threshold.
76. For good measure, the Further Affidavit sworn by the 2nd Defendant/Applicant and which sought to bring fourth the electronic certificate has stated and averred as hereunder:

Paragraph 7:

I wish to categorically state that the photographs adduced in support of the contempt application were taken by one Kennedy Mwavisi Ndambiri on the 7th of January 2023 using his mobile phone Vivo V27 5G Model No. A00000FBXXXX. Herewith annexed and marked CK-1 is a true copy of the certificate of electronic evidence in this regard.

Paragraph 8:

The said Kennedy Mwavisi Ndambiri took the photos in the ordinary cause of the said activities using a phone camera whose make and model has been given and the said objection is therefore superfluous and misplaced.

77. From the contents of paragraphs 7 and 8 of (sic) the further affidavit sworn on the 26th of February 2024 [details in terms of the preceding paragraphs], and which was intended to augment the previous affidavit, it is evident and apparent that the purported photographs were [sic] taken on the 7th of January 2023.



78. Without belaboring the point, the question that comes to the fore is how the said photographs, which were [sic] taken long before even the filing of the suit, can be contended to constitute a basis for establishing contempt of court orders which were issued on the 18th of January 2024.
79. Quiet clearly, the photographic evidence which the Applicants herein are propagating [relying on] before the court are incapable of sustaining the application for contempt.
80. Remarkably, even if the court were to venture forward and determine the instant application on merits, same [application] would still fail.
81. Consequently and in the premises, my answer to issue number three [3] is to the effect that the Application beforehand is equally misconceived and devoid [bereft] of merits.

Final Disposition:

82. From the foregoing discussion [analysis], it must have become crystal clear that the Application beforehand is not only premature and misconceived, but same is equally untenable and thus bad in Law.
83. In a nutshell, the Application dated the 8th of February 2024 be and is hereby dismissed with costs to the Plaintiff/Respondent and [sic] the contemnors, to be assessed by the Deputy Registrar of the Court in the usual manner.
84. It is so Ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 4TH DAY OF APRIL 2024.

OGUTTU MBOYA,

Judge.

In the Presence of:

Benson - Court Assistant.

Ms. Nasimiyu for the Defendants/Applicants.

Ms. Jacky Akinyi for the Plaintiff/Respondent and [sic] Contemnors

