



**Imara Educational Foundation Limited v Nur (Environment & Land
Case E006 of 2024) [2024] KEELC 5228 (KLR) (10 July 2024) (Ruling)**

Neutral citation: [2024] KEELC 5228 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND CASE E006 OF 2024**

**SM KIBUNJA, J
JULY 10, 2024**

BETWEEN

IMARA EDUCATIONAL FOUNDATION LIMITED PLAINTIFF

AND

ABDULRAHMAN SHARIFF NUR DEFENDANT

RULING

1. The plaintiff filed the notice of motion dated the 27th May 2024 pursuant to Order 40 rule 2 and 3 (i) of the Civil Procedure Rules, and Article 159 of the Constitution seeking the following orders:
 1. ” Spent.
 2. That this Honourable Court be pleased order the defendant herein one, Abdulrahman Shariff Nur to personally appear in court to show cause why he should not be committed to civil jail for a period of six (6) months for being in flagrant disobedience of court order
 3. That the Honourable Court be pleased to cite the said Abdulrahman Shariff Nur for disobedience of an express court order issued on the 30/4/2024.
 4. That this Honourable Court be pleased to grant orders that the said Abdulrahman Shariff Nur be directed and detained for being in contempt of court.
 5. That costs of this application be borne by the defendant.”

The application is premised on the seven (7) grounds on its face and supported by the affidavit of Carlos Sotz, in charge of the plaintiff’s development on MN/1/3881, sworn on 27th May 2024, in which he inter alia deposed that on the 30th April 2024, the court issued orders that pending the hearing and determination of the plaintiff’s application dated 2nd April 2024, an order of temporary injunction is hereby issued barring the defendant, his agents, servants and/or assigns from further constructing and/or developing the suit property known as Plot No. 16993/I/MOMBASA, CR 51734, situated



in Nyali, Mombasa County; that despite the order being clear and lucid, the defendant has flagrantly continued with the construction as shown in the attached photographs, in clear disregard of the order, and the application be granted as prayed.

2. The application is opposed by the defendant through the replying affidavit of Abdulrahman Shariff Nur, the defendant, sworn on 4th June 2024 deposing inter alia that he has not violated the orders of 7th May 2024, as the alleged construction is not taking place on L.R No.16993 or any of the resultant subdivisions, numbers 23989 or 23990, but on L.R No. 16994 that is adjacent to the plaintiff's plot, L.R 3881, and does not belong to him; that he cannot be held liable for the said construction and is not in disobedience of the court order.
3. The following are the issues for the court's determinations in respect of the contempt application:
 - a. Whether the plaintiff has met the threshold of contempt of court.
 - b. Who bears the costs?
4. The court has carefully considered the grounds on the notice of motion and affidavit evidence and has come to the following findings:
 - a. Contempt of court was extensively discussed in the case of *Republic v Kajiado County & 2 Others ex parte Kilimanjaro Safari Club Limited J.R. No. 390 of 2014* where the court held as follows:

“Section 39 (2) (g) of the Act enjoins the Chief Justice to make Rules to provide for, among other things, the procedure relating to contempt of court. However, the rules to regulate the commencing and prosecuting of contempt of court applications under the Act are yet to be made. The law that previously applied in this regard was the *Contempt of Court Act* of 2016, until the decision of the High Court (J. Chacha Mwita) made on 9th November 2018 in Kenya Human Rights Commission v Attorney General & Another, [2018] e KLR. The said decision declared the *Contempt of Court Act* of 2016 invalid for lack of public participation as required by Articles 10 and 118(b) of *the Constitution*, and for encroaching on the independence of the Judiciary.

I am in the circumstances 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. It was in this respect observed in *Republic vs. Returning Officer of Kamkunji Constituency & The Electoral Commission of Kenya, HCMCA No. 13 of 2008*, that the High 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, 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 section 3A of the *Civil Procedure Act* to grant such orders that meet the ends of justice and avoid abuse of the process of Court.

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 vs. 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 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.”

b. Section 5 of the *Judicature Act* Cap 8 which provides as follows:

“(1) 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.”

The procedure in seeking contempt of court orders was described in *Christine Wangari Gachege vs Elizabeth Wanjiru Evans & Others Civil Application No. 233 of 2007*, {2014} eKLR where the court held:

“Though the Court of Appeal of England and Wales was established in 1875, some 92 years before the commencement of the *Judicature Act*, [24] the Act in the cited Section 5 simply directs that this court like the High Court must make reference to the powers exercised by the High Court of Justice in England and not those exercised by its counterpart, the Court of Appeal of England and Wales.

The High Court of Justice in England is that level of the court system in England, comprising three divisions, the Queen's Bench, the Chancery and Family Divisions. That court draws its jurisdiction to punish for contempt of court from both the statute, namely the *Contempt of Court Act*, 1981 and the Common Law. But the procedure to be followed in commencing, prosecuting and punishing contempt of court cases was, until 2012, as will shortly be explained, provided for by Order 52 Rules 1 to 4 of the Rules of the Supreme Court (RSC), made under the Supreme Court of *Judicature Act*, 1873 (or simply the *Judicature Act*, 1873). The *Judicature Act*, 1873 abolished a cluster of courts in England and Wales dating back to medieval periods, some with overlapping judicial powers, and in their place Supreme Court of Judicature, which must not be confused with the Supreme Court of the United



Kingdom which was established only on 1st October, 2009 assuming the judicial features of the House of Lords.

Order 52 RSC, until 2012 as alluded to earlier provide the procedure of commencing contempt of court proceedings. The procedure may be summarized as follows, in so far as it relates to the High Court of Justice:

- i. An application to the High Court of England for committal for contempt of court will not be granted unless leave to make such an application has been granted.
- ii. An application for leave must be made *ex parte* to a judge in chambers and supported by a statement setting out the particulars of the applicant as well as those of the person sought to be committed and the grounds on which his committal is sought, and by an affidavit verifying the facts relied on.
- iii. The applicant must give notice of the application for leave not later than the preceding day to the Crown Office.
- iv. Where an application for leave is refused by a Judge in chambers the applicant may apply afresh to a divisional court for leave within 8 days after the refusal by the Judge.
- v. When leave has been granted, the substantive application by a motion would be made to a divisional court.
- vi. The motion must be entered within 14 days after the granting of leave; if not, leave shall lapse.
- vii. The motion together with the statement and affidavit must be served personally on the person sought to be committed, unless the Court thinks otherwise.”

The Court of Appeal the case of Christine Wangari Gachege case [supra] correctly pointed out that leave, now called "permission" is not required where committal proceedings relate to a breach of a judgement, order, or undertaking.

- c. In the case of Samuel M. N. Mweru & Others v National Land Commission & 2 others [2020] eKLR the court held:

“A court without contempt power is not a court (Lawrence N. Gray, Criminal and Civil Contempt: Some Sense of a Hodgepodge, 72 ST. JOHN’S L. REV. 337, 342 (1998)). The contempt power (both in its civil and criminal form) is so innate in the concept of jurisdictional authority that a court that could not secure compliance with its own judgments and orders is a contradiction in terms, an “oxymoron.” Contempt power is something regarded as intrinsic to the notion of court; even obvious, I would say. In the common lawyer’s eye, the power of contempt “is inherent in courts, and automatically exists by its very nature.”

The court further held as follows:

“A court order is binding on the party against whom it is addressed and until set aside remain valid and is to be complied with. Article 159(1) of *the Constitution* provides



that judicial authority is derived from the people and vests in, and shall be exercised by, the courts and tribunals established by or under *the Constitution*. Under Article 10(1) of *the Constitution* the national values and principles of governance in the Article bind all State organs, State officers, public officers and all persons whenever any of them (a) applies or interprets *the Constitution*; (b) enacts, applies or interprets any law; or (c) makes or implements public policy decisions. Under clause (2) (a) of the same Article the national values and principles of governance include the Rule of Law.

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38. The test for when disobedience of a civil order constitutes contempt has come to be stated as whether the breach was committed ‘deliberately and mala fide.’^[40] A deliberate disregard is not enough, since the non-complier may genuinely, albeit mistakenly, believe he/she is entitled to act in the way claimed to constitute the contempt. In such a case good faith avoids the infraction.^[41] Even a refusal to comply that is objectively unreasonable may be bona fide (though unreasonableness could evidence lack of good faith).^[42]

39. These requirements – that is the refusal to obey should be both wilful and mala fides, and that unreasonable non-compliance, provided it is bona fide, does not constitute contempt – accord with the broader definition of the crime, of which non-compliance with civil orders is a manifestation. They show that the offence is committed not by mere disregard of a court order, but by the deliberate and intentional violation of the court’s dignity, repute or authority that this evinces.^[43] Honest belief that non-compliance is justified or proper is incompatible with that intent. The Constitutional Court of South Africa,^[44] underlined the importance to the Rule of Law, of compliance with court orders in the following terms:-

“Compliance with court orders is an issue of fundamental concern for a society that seeks to base itself on the rule of law. *The Constitution* states that the rule of law and supremacy of *the Constitution* are foundational values of our society. It vests the judicial authority of the state in the courts and requires other organs of state to assist and protect the courts. It gives everyone the right to have legal disputes resolved in the courts or other independent and impartial tribunals. Failure to enforce court orders effectively has the potential to undermine confidence in recourse to law as an instrument to resolve civil disputes and may thus impact negatively on the rule of law.”



In a book titled Contempt in Modern New Zealand the author stated:

“There are essentially four elements that must be proved to make the case for civil contempt. The applicant must prove to the required standard (in civil contempt cases which is higher than civil 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.

- d. In the case of *De Lange vs Smuts* [1998] ZACC 6; 1998 (3) SA 785 (CC) para 147, the court stated that the power to imprison for coercive and non-punitive purposes is ‘an extraordinary one’:

“The power to order summary imprisonment of a person in order to coerce that person to comply with a legal obligation is far-reaching. There can be no doubt that indefinite detention for coercive purposes may involve a significant inroad upon personal liberty. Clearly it will constitute a breach of s 12 of *the Constitution* unless both the coercive purposes are valid and the procedures followed are fair. In this case there seems no doubt that the purpose is a legitimate one. It also seems necessary and proper, however, for the exercise of the power to be accompanied by a high standard of procedural fairness.”

- e. The defendant's contention that the construction subject matter of the plaintiff's contempt application is not been carried out on L.R. No. 16993, the suit property, or the subdivisions therefrom, L. R. No. 23989 or 23990, but on L.R. No. 16994, that does not belong to him, has not been rebutted. In light of the above precedents, and the parties' contestations on parcel of land the ongoing constructions is being carried out, and with a view of fast tracking this matter, it is necessary for the court to visit to the locus at the earliest opportunity to ascertain on what plot the ongoing construction is. During the visit, the parties will be at liberty to be accompanied by their licensed surveyor and counsel to observe the exercise. The court will thereafter make a determination on whether the Respondent is in contempt of court.
- f. The costs under section 27 of *Civil Procedure Act* chapter 21 of Laws of Kenya follow the event, unless where there is good reason to depart from the rule. In view of the finding in (e) above, the issue of costs will await the outcome of the visit to the locus.

5. In view of the above conclusions and in furtherance of the overriding objectives in section 1A,1B and 3A of the *Civil Procedure Act*, Chapter 21 of the Laws of Kenya, the court orders as follows:

- a. That the determination on whether or not the respondent is in contempt of the court order will wait the outcome of the court visit to the locus on a date to be fixed today.
- b. The parties herein be at liberty to be accompanied by a licenced surveyor of their choice, to observe the exercise.

Orders accordingly.



DATED, SIGNED AND VIRTUALLY DELIVERED ON THIS 10TH DAY OF JULY 2024.

S. M. KIBUNJA, J.

ELC MOMBASA.

In The Presence Of:

Plaintiff : Mr Furaha For Adhoch

Defendant : M/s Amina For Khalid Salim

Leakey – Court Assistant.

S. M. KIBUNJA, J.

ELC MOMBASA.

