Gatonye & another v Kamau & another (Environment & Land Case 579 of 2009) [2024] KEELC 6362 (KLR) (3 October 2024) (Ruling)

Neutral citation: [2024] KEELC 6362 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ENVIRONMENT & LAND CASE 579 OF 2009

JO MBOYA, J

OCTOBER 3, 2024

BETWEEN

JOSEPH GATONYE ..... 1ST PLAINTIFF

DAVID MUCHIRI GIKONYO ..... 2ND PLAINTIFF

AND

JENNIFER WANGARI KAMAU ..... 1ST DEFENDANT

THE CITY COUNCIL OF NAIROBI ..... 2ND DEFENDANT

RULING

Introduction and Background

1. The Ruling herein relates to two [2] applications; one which has been filed by the 1st Defendant while the other has been filed by the Plaintiffs herein. For coherence, the Application filed by the 1st Defendant is dated 19th July 2024 and wherein the 1st Defendant/Applicant seeks the following reliefs:

    i. .....Spent

    ii. The Honourable Court be pleased to order a stay of execution of the judgement and decree given by this Honourable Court on (sic) 9th May 2024 and the consequential orders pending the inter partes hearing of this application.

    iii. The Honourable Court be pleased to order stay of execution of the judgement/decree herein and any subsequent orders for thereof for such time and period which the court will deem fit to grant pending the parties' negotiations and amicable settlement of the matter.

    iv. That upon parties arriving at an amicable settlement, to report to court within 30 days and the court be pleased to review its judgement and decree as per the amicable settlement.

2. The application beforehand is anchored on various grounds which have been enumerated in the body thereof. Furthermore, the application is supported by the affidavit of Jennifer Wangari Kamau sworn on even date and to which the deponent has annexed two [2] documents, inter alia, a copy of the decree of the court and a valuation report.

3. In response thereto, the Plaintiffs' filed grounds of opposition dated 16th September 2024 in opposition to the application by and on behalf of the 1st Defendant/Applicant. In particular, the Plaintiffs contended that the application under reference is not only misconceived but same constitutes a gross abuse of the due process of the court.

4. The second application is dated 9th August 2024 and same has been filed by the Plaintiffs. Suffice it to point out that the application beforehand seeks the following reliefs:

   i. .....Spent

   ii. .....Spent

   iii. The Honourable Court be pleased to cite the 1st Defendant, Jennifer Wangari Kamau for being in contempt of the judgement of the court and orders dated 1st October 2019 and decree dated 9th May 2023 and punish her as per Section 5 of the *Judicature Act* for having deliberately disobeyed the order of this Honourable Court.

   iv. This Honourable Court be pleased to cite the 1st, 2nd, 3rd and 4th Interested Parties namely Zipporah Wanjiku Gatuguta, Ronald Isika, Lawrence Wamanda Kibera and the directors of Superjam Electronics Limited, respectively for being in contempt of the judgement of the court and orders dated 1st October 2019 and decree dated 9th May 2023 and punish her as per Section 5 of the *Judicature Act* for having deliberately disobeyed the order of this Honourable Court.

   v. Summons be issued against Jennifer Wangari Kamau, Zipporah Wanjiku Gatuguta, Ronald Isika, Lawrence Wamanda Kibera and the directors of Superjam Electronics Limited to appear physically before this court and to show cause why they should not be committed to jail.

   vi. Costs of this application be provided for.

5. The instant [second] application is premised on various grounds which have been highlighted at the foot thereof. In addition, the application is supported by the affidavit of Sarah Namanja Gatonye, who is the legal administratix of the estate of Jospeh Gatonye, now deceased.

6. Upon being served with the application by and on behalf of the Plaintiffs, the 1st Defendant filed a Preliminary Objection as well as a Replying Affidavit and in respect of which, the 1st Defendant raised and canvassed a plethora of issues.

7. Suffice it to point out that the 1st Defendant contended that the application by the Plaintiffs contravenes the provisions of Order 1 Rule 13 of the *Civil Procedure Rules* to the extent that the deponent of the Supporting Affidavit has not exhibited the authority to swear the affidavit on behalf of the 2nd Plaintiff.

8. On the other hand, the 1st Defendant has also contended that the entirety of the Supporting Affidavit does not demonstrate any incidence of wilful disobedience of the judgement and decree of the court. In this regard, it has been contended that the Plaintiffs have therefore failed to satisfy the requisite threshold for contempt of court.

9. The Interested Parties on their part responded to the application dated 9th August 2024 vide a Replying Affidavit sworn on 13th September 2024 and wherein same [Interested Parties] have contended that same were neither parties to the suit and hence not bound by the judgement and decree rendered by the court.

10. The subject application was scheduled for hearing on 18th September 2024 whereupon the advocates for the respective parties covenanted to canvass and ventilate the application by way of oral submissions. In this regard, the court proceeded to and ratified the agreement by the parties and prescribed the timelines for the ventilation of the application under reference.

Parties' Submissions:

a. Plaintiffs' Submissions:

11. The Plaintiffs herein adopted the grounds alluded to at the foot of the application dated 9th August 2024 and the contents of the Supporting Affidavit thereto. Furthermore, the Applicant thereafter highlighted three [3] salient issues for consideration by the court.

12. Firstly, learned counsel for the Plaintiffs submitted that the Plaintiffs herein filed and/or commenced the instant suit way back in 2009 and thereafter the suit was heard and disposed of vide judgement rendered on 1st October 2019. In addition, learned counsel contended that the judgement under reference ordered and directed the 1st Defendant to vacate and handover vacant possession of the suit property.

13. It was the further submissions of learned counsel for the Plaintiffs that upon the delivery of the judgement and the issuance of the consequential decree, the 1st Defendant herein felt aggrieved and proceeded to file an appeal before the Court of Appeal. Besides, it was posited that the appeal that was filed by the 1st Defendant has since been dismissed.

14. Nevertheless, learned counsel for the Plaintiffs submitted that despite being aware of the clear and unequivocal terms of the judgement and decree of the court, the 1st Defendant has failed to vacate and handover vacant possession of the suit property.

15. On the contrary, learned counsel for the Plaintiffs has submitted that the 1st Defendant has remained adamant and continues to occupy the suit property, without due regard to the terms of the judgement. Furthermore, learned counsel for the Plaintiffs has submitted that the 1st Defendant also continues to derive profits vide rents from the Interested Parties who are tenants in the suit property.

16. Arising from the foregoing, learned counsel for the Plaintiffs has submitted that the conduct of the 1st Defendant of remaining in occupation and possession of the suit property despite the clear terms of the judgement of the court constitutes and amounts to contempt of court.

17. Secondly, learned counsel for the Plaintiffs has submitted that the 1st Defendant was privy to and knowledgeable of the terms of the judgement of the court. Additionally, it has also been submitted that following the rendition of the judgement, the requisite decree was duly extracted and thereafter served upon the 1st Defendant as well as the Interested Parties.

18. Owing to the foregoing, learned counsel for the Plaintiffs has submitted that the 1st Defendant and the Interested Parties are therefore knowledgeable of the terms of the judgement of the court. At any rate, learned counsel for the Plaintiffs has posited that it is the obligation of the 1st Defendant and the Interested Parties to comply with and adhere to the terms of the judgement of the court.

19. Thirdly, learned counsel for the Plaintiffs has submitted that the court is seized and possessed of the inherent jurisdiction to ensure that its orders are duly complied with and/or adhered to by all the litigants, the 1st Defendant, not excepted. In this regard, it has been contended that where there is an incidence of contempt, then the court needs to intervene by citing and punishing the contemnors.

20. Finally, learned counsel for the Plaintiffs has submitted that the Preliminary Objection which has been filed and canvassed by learned counsel for the 1st Defendant does not raise any pure point of law. For good measure, counsel has posited that the Preliminary Objection under reference seeks to invite the court to delve into factual controversy which does not fall within the purview of a Preliminary Objection. In this regard, learned counsel for the Plaintiffs cited and referenced the holding in *Mukiisa Biscuits Limited v Westend Distributors Limited* 1969 EA page 699 Laws of Kenya.

21. Further and in any event, learned counsel for the Plaintiffs added that the fact that the deponent of the Supporting Affidavit has neither annexed nor exhibited the authority of the 2nd Plaintiff does not by itself negate and/or defeat the validity of the application for contempt. In this regard, it was contended that the application can still proceed and be determined on merits.

22. Other than the foregoing, learned counsel for the Plaintiffs has cited and referenced the provisions of Article 159 (2)(d) of the *Constitution* 2010 and thereafter invited the court to find and hold that the point being canvassed by the 1st Defendant merely raises a procedural and technical issue which ought not to be deployed to defeat the substance of the application.

23. In view of the foregoing, learned counsel for the Plaintiffs has therefore implored the court to find and hold that the application dated 9th August 2024 is meritorious and thus same ought to be allowed. In addition, it has been posited that the court ought to find that the 1st Defendant and Interested Parties are indeed guilty of contempt and thereafter to cite and punish same accordingly.

b. 1st Defendant's Submissions:

24. The 1st Defendant referenced the application dated 19th July 2024 as well as the Supporting Affidavit thereto and thereafter same contended that the 1st Defendant is an older citizen and thus the court is obligated to ensure that her [1st Defendant] rights in terms of Article 57 of the *Constitution* are duly protected.

25. Secondly, learned counsel for the 1st Defendant has also submitted that the 1st Defendant entered upon and commenced the construction on the suit property in 1992 whereas the Plaintiffs have never been in occupation of the suit property. In this regard, learned counsel for the 1st Defendant has contended that the 1st Defendant should therefore be granted latitude to undertake negotiations with the Plaintiffs in an endeavour to settle the matter.

26. Thirdly, learned counsel for the 1st Defendant has submitted that the 1st Defendant has since commenced the process towards negotiating the dispute with the Plaintiffs and that there is a likelihood that a settlement may be reached. In any event, learned counsel for the 1st Defendant has posited that the 1st Defendant spent her entire savings in developing the suit property and thus the court should consider the extent of such investments.

27. As pertains to the application by the Plaintiffs herein, learned counsel for the 1st Defendant has submitted that the Supporting Affidavit sworn on by the deponent is deficient and incompetent insofar as same has neither attached nor exhibited the authority of the 2nd Plaintiff in the manner espoused by the provisions of Order 1 Rule 13 (2) of the *Civil Procedure Rules* 2010.

28. According to the learned counsel for the 1st Defendant, the failure to exhibit and file the authority of the 2nd Plaintiff goes to the root of the application and thus the application before the court is incompetent. In this regard, learned counsel for the 1st Defendant invited the court to strike out the entire application for being an abuse of the due process of the court.

29. Additionally, learned counsel for the 1st Defendant has also submitted that insofar as the deponent of the Supporting Affidavit has not attached the authority of the 2nd Plaintiff, then the application has been made in bad faith. In this regard, counsel posited that the application has been made with unclean hands and thus same reeks of malafides.

30. Finally, learned counsel for the 1st Defendant has submitted that the Plaintiffs have also not demonstrated the existence of wilful disobedience of the judgement of the court and the resultant decree. In particular, learned counsel has contended that the application for contempt has been filed during the pendency of an application for stay and wherein the 1st Defendant is seeking for time to negotiate with the Plaintiffs.

31. In view of the foregoing, learned counsel for the 1st Defendant has therefore submitted that in the absence of clear evidence of wilful disobedience, the contention that the 1st Defendant and the Interested Parties are in contempt of court, is misleading and legally untenable.

32. In the premises, learned counsel for the 1st Defendant has implored the court to find and hold that the application for contempt dated 9th August 2024 is devoid of merits, whereas the application dated 19th July 2024 is meritorious and thus ought to be allowed.

c. Interested Parties' Submissions:

33. On behalf of the Interested Parties, it was contended that same were not parties to the suit at the onset. In this regard, learned counsel for the Interested Parties submitted that the judgement and decree of the court does not therefore affect and/or impact upon the Interested Parties.

34. Secondly, learned counsel for the Interested Parties submitted that insofar as same [Interested Parties] were not parties to the suit, same require some timeline to verify the validity and veracity of the judgement and decree that the Plaintiffs are seeking to enforce.

35. Thirdly, learned counsel for the Interested Parties has also submitted that contempt proceedings are quasi criminal and hence, the Plaintiffs herein are called upon to tender and place before the court plausible evidence to satisfy the burden of proof. Besides, it was posited that the burden of proof in matters pertaining to contempt is higher than the burden of proof in ordinary civil proceedings.

36. Finally, learned counsel for the Interested Parties submitted that the Plaintiffs herein have no claim as against the Interested Parties and thus the application before the court ought to be dismissed.

d. Plaintiffs' Rejoinder:

37. In response to the submission that the application beforehand is incompetent for contravening the provisions of Order 1 Rule 13(2) of the *Civil Procedure Rules*, learned counsel for the Plaintiffs has invited the court to take cognisance of the provisions of Article 159 2(d) of the *Constitution* 2010. In this regard, counsel has pointed out that the court should rise beyond procedural and technical objections and thereafter deal with the substance of the dispute.

38. Secondly, learned counsel for the Plaintiffs has submitted that the affidavit in support of the application details and articulates clear incidences of wilful disobedience on the part of the 1st Defendant and the

Interested Parties. In any event, it has been submitted that the terms of the judgement and the resultant decree do not require any further interpretation.

39. Thirdly, learned counsel for the Plaintiffs has submitted that the Plaintiffs herein have hitherto filed execution proceedings but the 1st Defendant and the Interested Parties herein have thwarted all the efforts to recover vacant possession of the suit properties. In this regard, it has been contended that the Plaintiffs herein have been left with no alternative, but to resort to and/or invoke the jurisdiction of the court to cite and punish the contemnors herein.

40. Finally, learned counsel for the Plaintiffs has submitted that the Plaintiff/Applicants herein have no time to negotiate with the 1st Defendant. In any event, it has been posited that the dispute beforehand has since been adjudicated upon and determined vide judgement of the court.

41. In addition, learned counsel for the Plaintiffs has also posited that the court is divested of the mandate and/or authority to compel the Plaintiffs to negotiate with the 1st Defendant. For good measure, it was stated that negotiations can only be entered into and undertaken out of volition and free will.

42. In view of the foregoing, learned counsel for the Plaintiffs has reiterated the position that the application by the 1st Defendant is misconceived and an abuse of the due process of the court whereas the application by the Plaintiffs is meritorious.

Issues for determination:

43. Having reviewed the applications beforehand; the response thereto, as well as the preliminary objection and upon taking into account the oral submissions ventilated on behalf of the parties, the following issues crystalise [emerge] and are thus worthy of determination.

    i. Whether the application dated 9th August 2024 is fatally deficient and defective for want of compliance with the provisions of the Order 1 Rule 13(2) of the *Civil Procedure Rules* 2010.

    ii. Whether the 1st Defendant and the Interested Parties are in contempt of the judgement and decree of the court and if so, whether same ought to be cited and punished.

    iii. Whether the court is seized of the requisite mandate and authority to compel parties to enter into negotiations and more particularly, where judgement has been rendered.

Analysis and Determination

i. Whether the application dated August 9, 2024 is fatally deficient and defective for want of compliance with the provisions of the Order 1 Rule 13(2) of the *Civil Procedure Rules* 2010.

44. Learned counsel for the 1st Defendant has submitted that the application dated 9th August 2024 is fatally deficient and incurably defective to the extent that the Supporting Affidavit thereto has not complied with the provisions of Order 1 Rule 13(2) of the *Civil Procedure Rules* 2010. In particular, learned counsel has posited that insofar as the affidavit is said to be sworn on behalf of the deponent and the 2nd Plaintiff, respectively, it was incumbent upon the deponent to file the requisite authority.

45. Furthermore, learned counsel has submitted that the provisions of Order 1 Rule 13(2) of the *Civil Procedure Rules* 2010 are couched in mandatory terms and thus failure to comply with and/or adhere to same renders the affidavit and by extension the application incompetent.

46. Premised on the foregoing, learned counsel for the 1st Defendant has invited the court to find and hold that the entirety of the application dated 9th August 2024 is incompetent and misconceived. Consequently, counsel has implored the court to dismiss the application with costs.

47. On the other hand, learned counsel for the Plaintiffs has contended that the deponent of the supporting affidavit has averred that the affidavit in question has been sworn for and on behalf of both the Plaintiffs. In any event, counsel has posited that the absence of the authority in accordance with Order 1 Rule 13(2) of the *Civil Procedure Rules* 2010; does not render the entire application incompetent.

48. On the other hand, learned counsel for the Plaintiffs has also submitted that the failure to comply with and/or adhere to the provisions of Order 1 Rule 13(2) of the *Civil Procedure Rules* 2010 amounts to procedural technicalities which ought not to be deployed to defeat the substance of the application before the court. In this regard, counsel has cited and referenced Article 159 (2)(d) of the *Constitution*.

49. Having reviewed the rival submissions by the parties, I beg to take the following position. Firstly, the supporting affidavit beforehand adverts to the judgement and decree of the court which was issued in favour of both Plaintiffs. To the extent that the judgement and decree was issued in favour of the Plaintiffs, any one of the Plaintiffs herein is at liberty to swear the affidavit in support of the application for execution including contempt proceedings.

50. Premised on the foregoing position, I hold the humble view that the supporting affidavit before the court contains facts which are vindicated by the record of the court and thus there is no deficiency or at all to warrant a finding that the said affidavit is incompetent.

51. Secondly, even though the provisions of Order 1 Rule 13(2) of the *Civil Procedure Rules* 2010 require that the authority of the co-plaintiff be in writing and be filed, the failure and/or neglect to file such authority does not ipso facto render the application incompetent. For good measure, the application remains valid and competent for and on behalf of the applicant who has sworn the affidavit.

52. To this end, the absence of the authority in accordance with Order 1 Rule 13(2) of the *Civil Procedure Rules* 2010 will only impact upon the application as pertains to the 2nd Plaintiff and not otherwise. In this regard, it is evident and apparent that even if the court were to agree with the submissions by learned counsel for the 1st Defendant, the application on behalf of the Plaintiff would still hold sway.

53. Thirdly, it is important to recall that the objection taken by and on behalf of the 1st Defendant touches on and concerns a procedural technicality. For good measure, the provisions of Order 1 Rule 13(2) of the *Civil Procedure Rules* 2010 allude to a question of procedure in terms of the necessity to file the written authority.

54. However, a failure to comply with and/or adhere to the provisions of Order 1 Rule 13(2) of the *Civil Procedure Rules* 2010 and in particular in a matter which has since been heard and determined, like the one beforehand, does not go to the substance of the matter.

55. Be that as it may, it is not lost on this court that whereas procedural rules ought to be complied with and adhered to, it does not mean that every breach and or infraction of the rules of procedure should non-suit the party in breach of the procedural rule. If such were the position, then the rules of procedure would be elevated to a fetish and the substance of the dispute relegated to the backburner. Such a scenario shall be antithetical to the rule of law and the general administration of justice.

56. At any rate, it is not lost on this court that the provisions of Article 159 (2)(d) of the *Constitution* behoves this court to rise beyond undue procedural technicalities and to endeavour to render substantive justice. In this regard, the clarion call is for the courts to ensure that substantive justice is rendered in lieu of undue procedural technicalities, unless it can be shown that the procedural technicalities go to the root of the jurisdiction of the court.

57. Before departing from this issue, it suffices to cite and reference the holding of the Supreme Court [the apex court] in the case of *Mwicigi & 14 others v Independent Electoral and Boundaries Commission & 5 others* (Petition 1 of 2015) [2016] KESC 2 (KLR) where the court held thus:

> "(65) This Court has on a number of occasions remarked upon the importance of rules of procedure, in the conduct of litigation. In many cases, procedure is so closely intertwined with the substance of a case, that it befits not the attribute of mere technicality. The conventional wisdom, indeed, is that procedure is the handmaiden of justice. Where a procedural motion bears the very ingredients of just determination, and yet it is overlooked by a litigant, the Court would not hesitate to declare the attendant pleadings incompetent.
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> (66) Yet procedure, in general terms, is not an end in itself. In certain cases, insistence on a strict observance of a rule of procedure, could undermine the cause of justice. Hence the pertinence of Article 159 (2) (d) of the *Constitution*, which proclaims that, "... courts and tribunals shall be guided by...[the principle that] justice shall be administered without undue regard to procedural technicalities". This provision, however, is not a panacea for all situations befitting judicial intervention; and inevitably, a significant scope for discretion devolves to the Courts.
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> (67) As an instance, there are times when the disregard of Rule 33 of the Supreme Court Rules clearly undermines the Court's ability to deliver justice to all the parties in a dispute. (This is concerned with the mode of instituting appeals). In such a situation, the shield of Article 159 (2) (d) will not be deployed by the Court in aid of the offending litigant. Such is, however, not the case in the instant appeal. Notwithstanding the failure to adhere to all the requirements of the Rule at the initial stages, by the appellants herein, their subsequent actions did ensure that the Court was not without all the requisite documentation, for undertaking a consideration of the matter."

58. Non-compliance with procedural rules and the effect of such non-compliance was also highlighted by the Court of Appeal in the case of *Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 6 others* [2013] eKLR where the Court of Appeal [Ouka J.A] stated as hereunder:

> "Deviations from and lapses in form and procedures which do not go to the jurisdiction of the Court, or to the root of the dispute or which do not at all occasion prejudice or miscarriage of justice to the opposite party ought not be elevated to the level of a criminal offence attracting such heavy punishment of the offending party, who may in many cases be innocent since the rules of procedure are complex and technical. Instead, in such instances the Court should rise to its highest calling to do justice by sparing the parties the draconian approach of striking out pleadings. It is globally established that where a procedural infraction causes no injustice by way of injurious prejudice to a person, such infraction should not have an invalidating effect. Justice must not be sacrificed on the altar of strict adherence to provisions of procedural law which at times create hardship and unfairness."

59. Arising from the foregoing discussion, my answer to issue number one [1]is threefold. Firstly, the failure and/or neglect to exhibit and file the authority in writing on behalf of the 2nd Plaintiff does not render the entire application dated 9th August 2024 incompetent.

60. Secondly, the supporting affidavit attached to the application dated 9th August 2024 regurgitates and articulates issues that are obtaining on the record of the court. In particular, the issues adverted to at the foot of the supporting affidavit are common ground and hence the application for contempt can still be prosecuted on the basis of the singular affidavit on behalf of the 1st Plaintiff.

61. Thirdly, the failure and/or neglect that was highlighted by the learned counsel for the 1st Defendant touches on and concerns a procedural technicality which does not go to the root of the jurisdiction of the court and thus same does not vitiate the proceedings.

62. Simply put, the non-compliance with the provisions of Order 1 Rule 13(2) of the *Civil Procedure Rules* 2010 in respect of this matter, which has since been heard and determined vide a lawful judgement, does not invalidate the application dated 9th August 2024.

ii. Whether the 1st Defendant and the Interested Parties are in contempt of the judgement and decree of the court and if so, whether same ought to be cited and punished.

63. To start with, there is no gainsaying that the dispute beforehand was heard and determined by this court [differently constituted], culminating into a judgement which was delivered on 1st October 2019. For coherence, the terms of the judgement under reference were explicit and unequivocal.

64. Suffice it to point out that the judgement of the court which was rendered on 1st October 2019 found and held that the suit properties belong to the Plaintiffs herein. Furthermore, the court proceeded to and ordered the 1st Defendant together with anyone claiming under her to vacate and handover vacant possession of the suit properties to the Plaintiffs herein.

65. The judgement under reference has neither been reviewed, varied and/or set aside. At any rate, evidence abound that an appeal that was filed against the judgement was dismissed by the Court of Appeal.

66. Nevertheless, the 1st Defendant was a party to the suit and the Interested Parties herein, who are her tenants have continued to occupy the suit property. In this regard, it suffices to point out that the continued occupation and possession of the suit property by the 1st Defendant and the Interested Parties is contrary to and in contravention of the clear terms of the judgement of the court.

67. There is no gainsaying that every party and/or person who is knowledgeable of and/or privy to a court order is called upon to comply with and/or adhere to the terms thereof. For good measure, compliance with the court order is mandatory and peremptory. In this regard, both the 1st Defendant and the Interested Parties have an unqualified obligation to comply with and respect the decree of the court.

68. To this end, it is apposite to cite and reference the holding in the case of *Hadkinson v Hadkinson* [1952] ALL E.R. 567, in which Romer, L.J. said at p.569

> "It is the plain and unqualified obligation of every person against, or in respect of whom, an order is made against by a court of competent jurisdiction to obey it unless and until that order is discharged. The uncompromising nature of this obligation is shown by the fact that it extends even to cases where the person affected by an order believes it to be irregular or even void."

69. The unqualified nature of the obligation to obey and respect court orders was rested in the case of *Chuck v Cremer* (1846) 1 Coop. temp. Cott. 342 where Lord Cottenham, L.C., stated:

> "A party, who knows of an order, whether null or valid, regular or irregular, cannot be permitted to disobey it... It would be most dangerous to hold that the suitors, or their solicitors, could themselves judge whether an order was null or valid – whether it was regular or irregular. That they should come to the court and not take upon themselves to determine such a question. That the course of a party knowing of an order, which was null or irregular, and who might be affected by it, was plain. He should apply to the court that it might be discharged. As long as it existed it must be obeyed."

70. Closer home, the unqualified obligation on a party to respect and comply with a court order was highlighted in the case of *Wildlife Lodges Limited v Narok County Council* [2005] eKLR where the court categorically stated as follows:

> "It was the plain and unqualified obligation of every person against or in respect of whom an order was made by a Court of competent jurisdiction to obey it until that order was discharged, and disobedience of such an order would, as a general rule, result in the person disobeying it being in contempt and punishable by committal or attachment and in an application to the court by him not being entertained until he had purged his contempt. A party who knows of an order, whether null or valid, regular or irregular, cannot be permitted to disobey it...It would be most dangerous to hold that the suitors, or their solicitors, could themselves judge whether an order was null or valid – whether it was regular or irregular. That they should come to the court and not take upon themselves to determine such a question. That the course of a party knowing of an order which was null or irregular, and who might be affected by it, was plain. He should apply to the court that it might be discharged. As long as it existed it must not be disobeyed...If there is a misapprehension in the minds of the defendants as to the reasonable meaning of the order, then the expectation of them is that they would have made an application to the court for the resolution of any misunderstanding and this would have been the lawful course...In cases of alleged contempt, the breach for which the alleged contemnor is cited must not only be precisely defined but also proved to the standard which is higher than proof on a balance of probabilities but not as high as proof beyond reasonable doubt...The inherent social limitations afflicting most people in a developing country such as Kenya have the tendency to restrict access to the modern institutions of governance, and more particularly to the judiciary which is professionally run, on the basis of complex procedures and rules of law. Yet, this same Judiciary is generally viewed as the impartial purveyor of justice, and the guarantor of an even playing ground for all, a perception which ought to be strengthened, through genuine respect for the courts of justice, and through compliance with their orders.
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> Consistent obedience to court orders is required, and parties should not take it upon themselves to decide on their own which court orders are to be obeyed and which ones overlooked, in the supposition that this oversight will not impede the process of justice... Justice dictates even-handedness between the claims of parties; and if it be the case that the plaintiff/applicant has not been accorded a level playing ground for the realisation of its economic activities, a matter that of course can only be established through evidence in the main suit, then the court ought to provide relief, by applying the established principles of law, one of these being the law of contempt...An ex parte order by the court is a valid order like any other and to obey orders of the court is to obey orders made both ex parte and

inter partes since the Court by section 60 of the *Constitution* is the repository of unlimited first instance jurisdiction, and in this capacity it may make ex parte orders where, after a careful and impartial consideration, it is convinced that issuance of such an order is just and equitable. There is nothing potentially oppressive in an ex parte order, since such an order stands open to be set aside by simple application, before the very same court...Where a party considers an ex parte order to cause him undue hardship, simple application will create an opportunity for an appropriate variation to be effected thereto; and therefore there will be no excuse for a party to disobey a court order merely on the grounds that it had been made ex parte and this argument will not avail either the first or the second defendant."

71. Likewise, in the case of *Kenya National Union of Teachers v Teachers Service Commission* [2013] eKLR the court while considering the necessity to obey and respect a court order stated as hereunder:

> " 39. A court order is not a mere suggestion or an opinion or a point of view. It is a directive that is issued after much thought and with circumspection. It must therefore be complied with and it is in the interest of every person that this remains the case. To see it any other way is to open the door to chaos and anarchy and this Court will not be the one to open that door. If one is dissatisfied with an order of the court, the avenues for challenging it are also set out in the law. Defiance is not an option."

72. Guided and duly nourished by the succinct exposition of the law in the cases supra, the question that this court must now grapple with is whether the 1st Defendant and the Interested Parties who are knowledgeable of the terms of the decree of the court can be allowed to remain in occupation of the suit property and whether such continued occupation is tantamount to contempt.

73. To my mind, it is incumbent upon the 1st Defendant and by extension her tenants to heed and respect the orders of the court. At any rate, it is important to point out that one does not require to be served with a court order prior to complying with the terms thereof. It suffices that one is knowledgeable of the court order and in this case, the 1st Defendant and the Interested Parties are privy to and knowledgeable of the terms of the court order.

74. To buttress the legal position that knowledge of the court order would suffice, it is imperative to cite and reference the holding of the Court of Appeal in the case of *County Executive Committee, Kisii County Government and 2 others v Masosa Construction Company Limited* 2020 eKLR where the court held as hereunder:

> " 19. In *Justus Kariuki Mate v Martin Nyaga Wambora*, [2014] eKLR this Court acknowledged the move from the position that an order endorsed with a penal notice must be personally served on a person before contempt can be proved. Lenaola, J (as he then was) in the case of *Basil Criticos v Attorney General* [2012] eKLR perceived an additional ground for dispensation with the requirement for personal service; "...where a party clearly acts and shows that he had knowledge of a court order, the strict requirement that personal service must be proved is rendered unnecessary". Similarly, the requirement of notice of the prohibitory judgement or order would also be satisfied where a party is represented counsel who was present in court when the orders were made. Therefore, knowledge of the judgment or order by an alleged contemnor's advocate suffices for contempt proceedings."

75. Flowing from the foregoing, there is no gainsaying that both the 1st Defendant and the Interested Parties are knowledgeable of the court order and hence it behoves same to comply therewith. In particular, the 1st Defendant and the Interested Parties ought to have vacated the suit property and handed over vacant possession.

76. However, to the extent that the 1st Defendant and the Interested Parties have failed to vacate and hand over vacant possession, their continued occupation, possession and use of the suit property constitutes wilful disobedience and disregard of lawful court orders. Such conduct is antithetical to the rule of law and must therefore be frowned upon.

77. To this end, it suffices to cite and reference the holding of the Court of Appeal in the case of *Shimmers Plaza Limited v National Bank of Kenya Limited* [2015] eKLR where the court stated as hereunder:

> "We reiterate here that court orders must be obeyed. Parties against whom such orders are made cannot be allowed to trash them with impunity. Obedience of Court orders is not optional, rather, it is mandatory and a person does not choose whether to obey a court order or not. For as Theodore Roosevelt, the 26th President of the United States of America once said:
>
> > "No man is above the law and no man is below it; nor do we ask any man's permission to obey it. Obedience to the law is demanded as a right; not as a favour".
> >
> > The courts should not fold their hands in helplessness and watch as their orders are disobeyed with impunity left, right and centre. This would amount to abdication of our sacrosanct duty bestowed on us by the Constitution. The dignity, and authority of the Court must be protected, and that is why those who flagrantly disobey them must be punished, lest they lead us all to a state of anarchy. We think we have said enough to send this important message across."

78. In view of the foregoing, my answer to issue number two is to the effect that the terms and tenor of the decree of the court was and remains crystal clear. Nevertheless, the 1st Defendant and the Interested Party has chosen to disregard the terms of the court order with abandon.

79. Quite clearly, the kind of scenario obtaining in this matter and the conduct being displayed by the 1st Defendant and the Interested Party cannot be countenanced by a conscientious court of law. It suffices to underscore that court orders must be obeyed by all and sundry irrespective of social, economic and political status.

iii. Whether the court is seized of the requisite mandate and authority to compel parties to enter into negotiations and more particularly, where judgement has been rendered.

80. Other than the application filed by the Plaintiffs, it is important to underscore that the 1st Defendant herein also filed an application and wherein the 1st Defendant is seeking an order of stay of execution pending negotiations with the Plaintiffs.

81. On the other hand, the 1st Defendant has also sought liberty to report back on the terms/outcome of the negotiations and thereafter that the court be pleased to review the decree in accordance with (sic) anticipated applicable settlement.

82. Suffice it to underscore that upon being served with the application beforehand, the Plaintiffs filed grounds of opposition dated 16th September 2024 and wherein same have adverted to the position that

the Application beforehand is not only misconceived but constitutes an abuse of the due process of the court.

83. To my mind, the application by and on behalf of the 1st Defendant seeks to invite the court to compel, force and/or better still coerce the Plaintiffs to sit down with and enter into negotiations with the 1st Defendant. In this regard, the question that does arise is whether a court of law can compel and/or coerce parties to negotiate or otherwise.

84. In my humble view, negotiations are founded and anchored on good will and free will of the parties. It is the parties who exercise their freedom of assembly and expression in determining whether to sit down and talk or otherwise. The bottom line is that a court of law cannot coerce an unwilling party to negotiate with another.

85. Furthermore, it is not lost on this court that the 1st Defendant herein had all the latitude and platitude to negotiate with the Plaintiffs, subject to the concurrence of the Plaintiffs before judgement was delivered. However, no such endeavours were ever made.

86. Be that as it may, it is also common ground that for a contract to exist, it suffices that there shall be an offer made freely by one party, in this case the 1st Defendant, to the offeree, in this case the Plaintiffs, and such offer shall be subject to acceptance or otherwise. [See the holding of the Supreme Court in the case of *Moi University v Zaippeline & another* (Petition 43 of 2018) [2022] KESC 29 (KLR))

87. Notwithstanding the foregoing, what is obtaining in respect of the instant matter is a situation where the 1st Defendant is adamant in making an offer to an unwilling party yet despite the stalemate, the 1st Defendant is beseeching the court to compel the unwilling party to negotiate.

88. The invitation by and on behalf of the 1st Defendant in terms of the Application dated the 19th July 2024 is not only premature but legally untenable. Quite clearly, this court, and I dare say any other court of law, cannot compel parties to enter into a contract of whatsoever nature.

89. In a nutshell, it is my finding and holding that this court is divested of the requisite jurisdiction to grant the relief sought by the 1st Defendant. For good measure, any endeavour to do so would be tantamount to breaching and/or violating the rights and fundamental freedoms of the Plaintiffs, including freedom of expression and right to fair hearing.

Final Disposition:

90. Flowing from the analysis contained in the body of the ruling, it must have become apparent and evident that the Plaintiffs herein have established and demonstrated that the 1st Defendant and the Interested Parties are knowledgeable of the terms and tenor of the judgement and decree of the court.

91. Furthermore, it is also crystal clear that despite being knowledgeable of the terms of the decree of the court, the 1st Defendant and the Interested Parties have remained adamant and thus their continued occupation of the suit property constitutes wilful disobedience of court order.

92. On the other hand, there is no gainsaying that the 1st Defendant herein cannot resort to and use the court in an endeavour to coerce the Plaintiffs to negotiate with same [1st Defendant] ex-post-delivery of the judgement.

93. Arising from the foregoing, the final orders that commend themselves to the court are as hereunder:

    a. The Preliminary Objection by the 1st Defendant be and is hereby dismissed with costs.

    b. The Application dated 19th July 2024 be and is hereby dismissed with costs.

c. The Application dated 9th August 2024 be and is hereby allowed with costs.

d. The 1st Defendant and the Interested Parties be and are hereby found guilty of contempt of court.

e. Summons be and are hereby issued to the 1st Defendant [Jennifer Wangari Kamau, Zipporah Wanjiku Gatuguta, Ronald Isika, Lawrence Wamanda Kibera and the Directors of Superjam Electronic Limited [The Interested Parties]], to appear in court personally to show cause why same should not be committed/sentenced to jail.

f. The parties [details in terms of (e) above] shall appear before the court within seven (7) days of the date of the ruling for purposes of mitigation and sentencing.

g. The date for court appearance shall however be agreed upon and or determined on the delivery of the ruling.

94. It is so ordered.

DATED, SIGNED AND DELIVERED ON THE 3RD DAY OF OCTOBER 2024

OGUTTU MBOYA

JUDGE.

In the presence of:

Benson – Court Assistant.

Mr. Kangogo for the Plaintiffs.

Mr. Mugo for the 1st Defendant.

Mrs. Kuria for the Interested Parties