



**Hasmo Agencies Limited v National Social Security Fund; Koros & 3 others (Contemnor)
(Land Case E052 of 2023) [2024] KEELC 6528 (KLR) (3 October 2024) (Ruling)**

Neutral citation: [2024] KEELC 6528 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
LAND CASE E052 OF 2023
OA ANGOTE, J
OCTOBER 3, 2024**

BETWEEN

HASMO AGENCIES LIMITED PLAINTIFF

AND

NATIONAL SOCIAL SECURITY FUND DEFENDANT

AND

DAVID KOROS CONTEMNOR

HELLEN C KOECH CONTEMNOR

OBED MBUVI CONTEMNOR

ISAAC TUEI KOSKEI CONTEMNOR

RULING

1. The 1st to 4th Contemnors have filed a Notice of Motion application dated 8th April 2024 under Order 40 Rule 4 and Order 51 Rule 1 of the [Civil Procedure Rules](#), as well as Section 3 and 3A of the [Civil Procedure Act](#). They have sought the following orders:
 - a. Spent
 - b. Spent
 - c. Spent
 - d. That the Honourable Court be pleased to set aside the orders and the ruling of the court dated 7th March 2024 and the contemnors be granted leave to defend and respond to the contempt application dated 9th November 2023 in person.
 - e. That costs of the application be awarded to the Respondent/Applicant in any event.



2. The grounds of this application are on the face of the application and the Supporting Affidavit sworn by David Koros, the Managing Trustee of the National Social Security Fund. Mr. Koros deponed that he was not aware of the proceedings in this suit and that the suit was only brought to his attention about a week before this application was filed and that that is when the contemnors instructed their advocates who formally came on the record.
3. It was deposed by the 1st contemnor that they were informed by their advocate that the contempt proceedings had proceeded in their absence and the contemnors were set to be sentenced on 15th April 2024. He deponed that the Plaintiff served the Defendant with the application and did not serve the contemnors in person whereas they were cited in their personal capacity. This, he asserts, was an abuse of court process and an injustice to the contemnors as they had no room to defend themselves in the suit.
4. The 1st contemnor deponed that the Defendant, through its officers, instructed an advocate to act on behalf of the Defendant and filed a response, without appreciating the nature of the matter. He emphasized that there was no one acting for the contemnors.
5. Mr. David Koros deponed that as he is the Managing Trustee of the Defendant; that he was the only person legally authorized and capable of committing the Defendant through its Board of Trustees and that the citing of the 2nd to 4th contemnors is unfair and without basis as they were incapable of directing and binding the Defendant.
6. The Plaintiff responded through a Replying Affidavit dated 23rd April 2024, sworn by Hassan Mahamed Abdirahman, the Director of the Plaintiff company. He averred that the application herein is frivolous, vexatious and an abuse of the court process; that the firm of Daniel and Kenneth LLP is not properly on record and has no legal standing to move this court on behalf of the Defendant and the alleged contemnors and that the Notice of Appointment dated 8th April 2024 was irregular, defective and void *ab initio*.
7. Hassan Mahamed Abdirahman asserts that the firm of Chesikaw & Kiprop Advocates are on record for the Defendant and the alleged contemnors and that the firm of Chesikaw & Kiprop Advocates filed a Replying Affidavit dated 22nd December 2022 sworn by the Defendant's Head of Legal, Helen Koech, who produced a written authority by the contemnors, authorizing her to swear affidavits on their behalf
8. He therefore deponed that this affidavit shows that the contemnors had full knowledge of the contempt proceedings against them and that the ruling dated 7th March 2024 was served upon the Defendant, the Defendant's Managing Trustee David Koros, Head of Legal Helen Koech, Property Manager Obed Mbuvi and the Head of Security Isaac Twei Koskei. However, it was deposed, the alleged contemnors have failed, refused or neglected to purge their acts of contempt.
9. He asserted that contempt proceedings were instituted against the contemnors in their capacities as the chief officers of the Defendant and not in their personal capacity.
10. In his Further Affidavit dated 8th May 2024, Mr. David Koros, the 1st contemnor, stated that the contemnors have never been represented by any advocate in their personal capacity. He asserts that they have instructed the firm of Daniel and Kenneth to act for them while the firm of Chesikaw & Kiprop Advocates is still on record for the Defendant. They therefore assert that the duly instructed advocates could only have regularized their appointment through a Notice of Appointment.
11. He further deponed that while the contempt proceedings have been brought in their capacity as officers of the Defendant, the penal consequences of the contempt proceedings can only be issued upon the



contemnors in person; that he only gave Hellen Koech the authority to represent the Defendant and that he did not give her authority to represent himself and the other contemnors.

12. Mr. Koros deponed that the contemnors were not served with the ruling dated 7th March 2024 as alleged in the affidavit sworn by Stephen Shikanda Advocate and that while the annexure in the affidavit shows his name as the saved contact, one is not able to confirm it was actually sent to his phone number. This, according to him, is the same for the other contemnors.
13. The parties filed submissions and authorities which I have considered.

Analysis and Determination

14. The contemnors herein have sought that this court sets aside its ruling dated 7th March 2024 and that this court grants them leave to defend and respond to the contempt application dated 9th November 2023 in person. They claim that the contempt application dated 9th November 2023 was not served upon them in person and that the hearing of the contempt application proceeded in their absence.
15. They assert that this was an abuse of court process and an injustice to them as they had no room to defend themselves in the suit.
16. The 1st Contemnor, David Koros, deponed that as he is the Managing Trustee of the Defendant, he was the only person legally authorized and capable of committing the Defendant through its Board of Trustees. He stated that the citing of the 2nd to 4th contemnors is unfair and without basis as they were incapable of directing and binding the Defendant.
17. The Plaintiff opposed the application and deponed that the contemnors were adequately represented in the hearing of the contempt application. They aver that the firm of Chesikaw & Kiprop Advocates represented the Defendant and the contemnors and further stated that the contemnors had full knowledge of the contempt proceedings against them and authorized Hellen Koech, the Head of Legal, to swear affidavits on their behalf.
18. The issues for the determination by this court are:-
 - a. Whether the contemnors had notice of the contempt application.
 - b. Whether the contemnors were represented during the hearing of contempt application.
 - c. Whether this court should set aside the ruling dated 7th March 2024.
19. This application is preceded by the ruling of this court dated 7th March 2024, wherein it found that the Defendant's Managing Trustee, David Koros, Head of Legal, Hellen C. Koech, Property Manager, Obed Mbuvi and the Head of Security Isaac Twei Koskei were in contempt of the orders of this court of 14th and 15th August, 2023.
20. Through the orders dated 14th and 15th August 2023, this court decreed that pending the hearing of the application inter partes on 25th January 2023, a temporary injunction do issue prohibiting the Defendant from erecting a blockade and/or obstruction through the aforementioned Defendant's vehicles at the entrances of the suit premises and restraining the Defendant from interrupting the Plaintiff's use, occupation, enjoyment of the property and the Plaintiff's business at the Carpark on Kenyatta Avenue Nairobi.
21. In its determination, this court was satisfied that the Defendant and the contemnors were duly served with the orders dated 14th and 15th August, 2023. The court found that despite such service, the Defendant continued to block the entrance to the suit property.



22. Counsel for the Contemnors has relied on Order 51 Rule 15 of the Civil Procedure Act which provides that the court may set aside an order made ex-parte. The contemnors contend that the ruling dated 7th March 2024 was made in their absence and for that reason, should be set aside.

23. The contemnors have relied on the case of *Shah vS Mbogo* [1967] E A 116 where the court held that the discretion to set aside ex parte orders is for the purpose of avoiding injustice or hardship resulting from, inadvertence or excusable mistake.

“The discretion is intended so to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but is not designed to assist the person who has deliberately sought whether by evasion or otherwise, to obstruct or delay the course of justice.”

24. The contemnors have also urged this court to exercise its special and inherent jurisdiction. They have relied on Sections 3 and 3A of the Civil Procedure Act, which provide that:

“3. Saving of special jurisdiction and powers

In the absence of any specific provision to the contrary, nothing in this Act shall limit or otherwise affect any special jurisdiction or power conferred, or any special form or procedure prescribed, by or under any other law for the time being in force.

3A. Saving of inherent powers of court.

Nothing in this Act shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.”

25. The inherent jurisdiction of the court refers to a residual source of power, which a court may draw from as necessary whenever it is just or equitable to do so, to ensure observance of the due process of the law, to prevent improper vexation or oppression, to do justice between the parties and to secure a fair trial between them. (I. H. Jacob, *Current Legal Problems* (1970) p 51).

26. The contemnors have sought that this court set aside its determination on the grounds that they did not have notice of the application and were not accorded an opportunity to defend themselves. David Koross’s key contention is that the contempt application was not served upon the contemnors individually, and was not in accordance with Order 5 Rule 22B of the Civil Procedure Rules on electronic mail service, which provides as follows:

“22B. Electronic Mail Services (E-mail) [Order 5, rule 22B]

(1) Summons sent by Electronic Mail Service shall be sent to the defendant's last confirmed and used E-mail address.

(2) Service shall be deemed to have been effected when the Sender receives a delivery receipt.

(3) Summons shall be deemed served on the day which it is sent; if it is sent within the official business hours on a business day in the jurisdiction sent, or and if it is sent outside of the business hours and on a day that is not a business day it shall be considered to have been served on the business day subsequent.



(4) An officer of the court who is duly authorized to effect service shall file an Affidavit of Service attaching the Electronic Mail Service delivery receipt confirming service.”

27. The Plaintiff aver that the contemnors were not only served with the application, but they also participated in the contempt proceedings by filing a response to the application. The question before this court is then whether there was service upon the contemnors of the application for contempt, and whether they were represented during the hearing of the contempt application.

28. In the case of *African Management Communication International Limited vs Joseph Mathenge Mugo & another* [2013] eKLR, Mabeya J held as follows:

“ Given that the 2nd defendant is a company, the question that arises is how service of an order is to be effected upon a company if the directors of such a company are to be committed for disobedience of such an order..., in order to hold a corporation with liability for contempt, it is necessary to show that the corporation has been properly served or that service has been dispensed with on the basis that an appropriate officer of the company had knowledge of the order. In the same way, in order to hold the directors of such a corporation personally liable for breach of an order, such directors should be served with the order or it must be shown that they had personal knowledge of the same.”

29. In the case before this court, the Plaintiffs have adduced the Affidavit of Service sworn by Stephen Shikanda on 20th November 2023. In his Affidavit, Mr. Shikanda deponed that he served copies of the contempt application dated 9th November 2023 via email to mt@nssfkenya.co.ke, the email address of the Chief Executive Officer of the 1st Defendant.

30. He also deponed that he served the application on David Koros through his phone number, which he confirmed by sending him money. The process server further indicated that he proceeded to the 1st Defendant’s officer and served an officer at the legal office of the Defendant, who acknowledged service by stamping and signing the process server’s copies.

31. Contrary to Order 5 Rule 22B of the *Civil Procedure Rules*, the process server, Mr. Shikanda, failed to annex a copy of an email delivery receipt, which is distinctly different from a copy of the email that was sent. A delivery receipt is similarly required under Order 5 Rule 22C with respect to mobile-enabled messaging applications such as Whatsapp.

32. This failure by the process server to comply with the procedure provided for under Order 5 Rule 22B and 22 C of the *Civil Procedure Rules* on service of the application for contempt, which by its very nature is serious, on the 1st Contemnor, prejudiced the 1st Contemnor, whose liberty is now at stake.

33. Indeed, as correctly submitted by the 1st Defendant’s advocates, it is only the 1st Defendant who can bind the Defendant in these proceedings and not the other listed contemnors. Consequently, the 1st contemnor should have been served with the application for contempt, either personally or as evinced under Order 5 Rule 22 C of the *Civil Procedure Rules*.

34. That being the case, it does not matter that Ms. Hellen Koech, the Defendant’s Legal Manager, responded to the application through a Replying Affidavit, and that she had the authority of Mr. David Koros, Mr. Obed Mbuvi and Mr. Isaac Tuei Koskei to swear the affidavit on their behalf.

35. This is so especially considering that Mr. David Koros, the 1st contemnor, in his Further Affidavit, denied authorizing Helen Koech to sign the affidavit dated 22nd December 2023 on his behalf.



36. That being the case, this court is satisfied that the contemnors, except Ms Hellen Koech, were not duly served with the contempt application. They were therefore not given an opportunity to be heard before the court found them to be in contempt.
37. For those reasons, the contemnors' application dated 8th April, 2024 is allowed as follows:
- a. The orders and the ruling of the court dated 7th March 2024 are set aside and the contemnors are granted leave to defend and respond to the contempt application dated 9th November 2023.
 - b. The costs of the application to be in the course.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 3RD DAY OF OCTOBER, 2024.

O. A. ANGOTE

JUDGE

In the presence of

Mr. Mutunga for Defendant

Mr. Kimathi for the 1st – 4th Contemnors

Mr. Shikanda for Osundwa for Plaintiff

Court Assistant - Tracy

