



REPUBLIC OF KENYA



Ogando v Kenya Ports Authority Pension Scheme (Defined Benefits) & another (Environment & Land Case 73 of 2021) [2024] KEELC 7041 (KLR) (15 October 2024) (Ruling)

Neutral citation: [2024] KEELC 7041 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND CASE 73 OF 2021
LL NAIKUNI, J
OCTOBER 15, 2024**

BETWEEN

JAMES OLUOCH OGANDO PLAINTIFF

AND

KENYA PORTS AUTHORITY PENSION SCHEME (DEFINED BENEFITS) 1ST DEFENDANT

KENYA PORTS AUTHORITY 2ND DEFENDANT

RULING

I. Introduction

1. This Honourable Court was called to make a determination unto two motions being the Notices of Motion applications dated 12th June, 2024 and 18th June, 2024 respectively both instituted by James Oluoch Ogando, the Plaintiff/Applicant respectively against the 1st and 2nd Defendants/Respondents herein.
2. Upon service of the said motions, and while opposing them, the 1st Defendant/Respondent filed their responses through a Replying Affidavit dated 19th July, 2024. Subsequently, with the leave of Court, the Plaintiff/Applicant filed further affidavit dated 20th July, 2024.

II. The Plaintiff/ Applicant's case on the Notice of Motion application dated 12th June, 2024

3. The Plaintiff/Applicant brought the application under the dint of Sections 1A, 1B of the [Civil Procedure Act](#) 2010 and the [Law of Contract Act](#), Cap. The Applicant sought for the following orders: -
 - a. This Honourable Court be pleaded to set aside the Consent Application dated 20th May 2024 from the 1st Defendant.
 - b. Each party to bear its own costs



4. The application was premised on the grounds, testimonial facts and averments made out under the face of the application and further supported by the 19th paragraphed annexed affidavit of James Oluoch Ogando. The Applicant averred that:-
- a. On 16th May 2024 the Plaintiff/Applicant met the Managing Director of Kenya Ports Authority (hereinafter referred to as “The KPA”), Sponsor of the 1st Defendant at the invitation of the latter, the purpose being to discuss the problems at the KPA Pension Scheme and see possibility of solving matters before this Honourable Court amicably.
 - b. It was agreed that the Plaintiff meets trustees and internal lawyers of the Scheme with a view to see possibility of moving the Court to refer the Court cases plus the Suit to Court Annexed Mediation which, in his opinion, could sort out the same in a matter of weeks not months or years.
 - c. The meeting took place at Sapphire Hotel Mombasa on 18th May 2024 and settled on consent, on the advice of the Scheme lawyers, whom later he found that he had been misled the meeting that only the Judge can do that.
 - d. While being treated to a heavy lunch by the trustees which made some of his fellow Pensioners go to sleep in the afternoon session, the lawyers of the trustees drafted the consent which he was given to sign but he declined to sign it as he was almost also going to sleep. He took it at home and made his own inputs to be incorporated in the draft consent which he later e-mailed to Scheme Administrator.
 - e. On 20th May 2024 the Scheme Administrator brought me the final draft of the Consent at his house at night to sign.
 - f. The print size had small letters which he could hardly read with his poor vision-one eye.
 - g. But in good faith he appended his signature at awkward place as he never saw the dotted lines where he was supposed to sign.
 - h. He did sign the consent draft believing it to be one incorporating his inputs yet it had omitted them.
 - i. The two consents were annexed as “Exhibits J001 and J002” the formers being his input and the latter being that which he signed in good faith.
 - j. It was his averment that the properties in the current tender be sold, assuming the laws had been observed, but the properties in the tender which were the subject matter in his committal Application dated 17th August 2023 must not be sold until the outcome of the ruling which was still pending was known, namely ruling on his contempt Application dated 17th August 2023.
 - k. They agreed with with the Administrator that their lawyer on record will be informed to have a discussion with him so they speak with one voice before the Judge
 - l. This did not happen. Instead, the lawyer on record, Mr. Kongere, filed the Consent Application without his knowledge and without serving him with the Hearing Notice with the intention of having it recorded, and have the Consent Order/decreed issued in his absence in Court that went against the law and he failed to convince the judge to accept the illegality.
 - m. In the case of:- “Wema Foundation Trust Company Limited – Versus - County Government of Nairobi City & another [2022] eKLR” the ELC Court Judge at Milimani said in Paragraph



11 that “.....It is trite law that the parties who would want the Court to adopt the Consent Judgement must be present in Court on the day when the document is presented for adoption and confirm.”. The Authority was annexed as “Exhibit No. J003”.

- n. He considered actions of the Scheme Administrator in omitting his inputs to be concealment of material facts.
- o. He also considered action of the lawyers on record for the first Defendant to be an abuse of the Court Process as the party to a case must be served with Hearing Notice and also be heard as our Constitution provides.
- p. Because of the above he hereby disowned the Consent before him.
- q. In any case they did not have a duly recorded consent nor did have any consent order or decree binding the parties.
- r. There should therefore be no further debate which merely waste the time of everybody on otherwise baseless matter.

III. The Plaintiff’s case in the Notice of Motion application dated 18th June, 2024

- 5. The Plaintiff/Applicant brought this application through the provision of Order 40 Rule 3 (1), 3 (2), 3 (3) and 4 of the Civil Procedure Rules, 2010; Section 5 of the Judicature Act (Cap. 8), Sections 1B, 3, and 3A of the Civil Procedure Act Cap. 21 and all other enabling provisions of the Law. The Applicant sought out for the following orders:-
 - a. Spent.
 - b. That, this Honourable Court make a finding that the following trustees of the 1st Defendants are in contempt of its Orders made on 7th May, 2024: -
 - 1. Mr. Justus Nyarandi
 - 2. Mr. Ferdinard K. Malumbo
 - 3. Mrs. Violet Mugambi
 - 4. Mrs. Susan Leli
 - 5. Ms. Catherine Wangari
 - 6. Mr. Francis Tsuma
 - 7. Mr. Emmanuel Kibet
 - 8. Ms. Caroline Njoki Maina
 - 9. Mr. David Bonyi
 - 10. Mr. Vincent Oweya-Scheme Secretary
 - 11. Mr. Bernard Kibet-Scheme Administrator
 - c. That having made a finding that the trustees named at sub-paragraph 2.1 to 2.11 above have breached the Order of the Court, this Honourable Court be pleased to Summon the same trustees to appear before it in person and physically to show cause why they should not be detained in prison for breaching its Orders mentioned in paragraph 2 Supra.



- d. That since this is the second time the 1st Defendant has breached the Order of this Honourable Court, the Land Registrar at Mombasa be inhibited from registering any transfer of all Pension Scheme properties to any third party until this Application is heard and determined.
 - e. That prayer No. 4 above be heard ex-parte to avoid subsequent ruling of this Court being rendered nugatory, in case the ruling is in favour of the Plaintiff/ Applicant.
 - f. That the Cost of this Application be borne by the 1st Defendant
6. This application was premised on the grounds, facts and testimony on the face of the application and further supported by the 7 paragraphed annexed affidavit of James Oluoch Ogando, the Applicant herein. The Applicant averred that: -
- a. On 7th May 2024, this Honourable Court issued interim injunctive Order restraining the 1st Defendant from processing tender for sale of properties which belong to members of Kenya Ports Authority Pension Scheme which it had floated through Daily Nation Newspapers of 26th April 2024. A copy of the Court Order was annexed as exhibit J001.
 - b. On 7th June 2024 the 1st Defendant publicly opened the said tender and allowed public participation. Annexed as exhibit J002 was a tabulation of analysis of the bids received and opened on 7th June, 2024. The total sum was Kenya Shillings Nine Hundred Million (Kshs. 900, 000.00/=).
 - c. This was a breach of the Order of the Court which stated that the tender should not be processed and ordered that inter parties hearing be done on 24th June 2024, which date had not been reached on 7th June 2024 when the tenders were opened.
 - d. Opening of tenders publicly was a process in tendering procedure.
 - e. For the above reasons the 1st Defendant had breached the Order of the Court and should be punished in the manner suggested in the Application being supported by this Affidavit, this being the second contempt.

IV. The Response by the 1st Defendant/ Respondent

7. The 1st Defendant/Respondent opposed the Notice of Motion application by the Plaintiff through an 11th paragraphed Replying affidavit sworn on 19th July, 2024 by Vincent M. Oweya, the 1st Defendant's Legal Officer and Acting Scheme Secretary who deponed on the following grounds: -
- a. In so far as the Plaintiff sought to set aside the consent dated 20th May 2024, no ground has been provided to justify the setting aside of the consent. Instead, the Plaintiff is engaged in a deliberate attempt to mislead the court. He said so because:-
 - i. The minutes of the meeting of 18th May 2024 were shared with the member's representative, Mr. Abaigowa Ngome, by email (He annexed and mark as "VO – 1" was a copy of the email sent on 19th June 2024 and the attached minutes of 18th May 2024).
 - ii. To date, there has been no suggestion that the minutes did not accurately reflect the discussions and agreement on 18th May 2024.
 - iii. The consent was derived from the aforesaid negotiations and signed by all the parties having fully understood what was to be signed.



- iv. It was agreed that the 1st Defendant would file the consent in court. Since the 1st Defendant had counsel on record, it could only file the consent through its counsel on record.
- v. After the consent was filed, the Plaintiff wrote a letter dated 30th May 2024 addressed to the 1st Defendant (He annexed and mark as “VO – 2” was a copy of the Plaintiff’s letter dated 30th May 2024 addressed to the 1st Defendant).
- vi. In that letter, the Plaintiff did not raise any complaint about the contents of the filed consent, nor did he allege any mistake. He only complains that the 1st Defendant’s advocate moved to have the consent adopted in the Plaintiff’s absence.
- vii. The Plaintiff also wrote another letter dated 30th May, 2024 addressed to the court (He annexed and mark as “VO - 3” was a copy of the Plaintiff’s letter dated 30th May 2024 addressed to the court).
- viii. In that letter, the Plaintiff did not contest the contents of the consent, nor did he allege mistake. His complaint was that the consent should not have been filed until the court had delivered its ruling on the then pending contempt application.
 - a. If, as the Plaintiff alleges, he had emailed a different consent with his comments to the Scheme Administrator, nothing would have been easier than for him to provide evidence of the email sent. He had provided none.
 - b. He therefore believed that the consent dated 20th May 2024 was discussed and willingly entered into. There was no mistake or misrepresentation as alleged. There was therefore no reason to set it aside.
 - c. Moreover, relying on that consent, the 1st Defendant has processed Tender No. KPAPS/DISP/002/2024 and issued awards to third parties. If the consent was to be set aside, it would be impossible for the 1st Defendant to undo the awards. It would also be pointless to hear the Plaintiff’s application for injunction to restrain sales that have already taken place
 - d. As for the contempt application, the order that the 1st Defendant was accused of disobeying was the same one that the parties set aside by the consent dated 20th May 2024.
 - e. Once that consent was signed by both parties on 20th May 2024, it became binding on the parties, notwithstanding that the court was yet to adopt it as an order of the court. Nonetheless, none of the parties could resale from the consent and none could act contrary to it. Concomitantly, the parties to that consent were entitled to act pursuant to the consent.
 - f. He therefore asked the court to dismiss the two (2) applications brought by the Plaintiff, and to allow the 1st Defendant to continue taking care of the interests of thousands of pensioners whose livelihoods are put at risk by the mendacious litigation being pursued by the Plaintiff



V. The Further Affidavit to the Replying affidavit

8. The Plaintiff responded to the Replying affidavit by the 1st Respondent through a 11 Paragraphed further affidavit sworn on 20th July, 2024 by the James Oluoch Ogando, the Plaintiff/Applicant herein where he deponed that:-
- a. Since the 1st Defendant chose to kill two birds with one stone, he would do exactly the same assuming that the court process was not abused.
 - b. With regards to the consent application he said this:-
 - a. It was trite that any application to court must be subjected to a fair hearing-consent application cannot be an exception.
 - b. In the instant case the consent application had not been heard and therefore no consent order/decreed or judgement had been issued.
 - c. The consent application was filed and the plaintiff/applicant was not served with notice of hearing.
 - d. The eagle eyed judge noticed the trick and ordered that the Plaintiff must be in court to confirm the agreement.
 - e. When he appeared in court he disowned the consent and confirmed that through his application dated 12th June 2024 which he filed in court.
 - c. He was waiting for determination of that application and he felt it was petty to say anything more.
 - d. With regard to his contempt application dated 18th June, 2024 he said this:-
 - a. It was trite in the Kenya laws that a court order must be obeyed even if the party to whom it was considers it incompetent.
 - b. The 1st Defendant had admitted that they processed the said tender, the court order being treated as an exercise in futility and issued in vain.
 - e. It was trite that in the Kenyan laws the Applicant in committal application must prove to the satisfaction of the court that indeed there has been contempt.
 - f. With admission of the 1st Defendant that the order was not obeyed, he had nothing to prove.
 - g. The Kenyan constitution provided that the liberty of the citizens must not be interfered with; the same constitution provides that where such liberty makes the other party suffer injury and loss, such as in this instant case then that liberty is not available to contemnor.
 - h. This Honorable Court extend the interim order it issued on 7th May, 2024 for 12 months and allow for hearing and determination of his application dated 12th June, 2024 and 18th June, 2024.

VI. Submissions

9. On 22nd July, 2024 while the Parties were present in Court, they were directed to have the Notices of Motion applications dated 12th June, 2024 and 18th June, 2024 be disposed of by way of written



submissions and all the parties complied. Pursuant to that all the parties obliged and on 30th July, 2024 a ruling date was reserved on 15th October, 2024 by Court accordingly.

A. The Written Submission by the Plaintiff/Applicant

10. The Plaintiff/Applicant acting in person filed his written submissions dated 29th July, 2024. The Plaintiff/Applicant commenced with his submissions by stating that in the Replying Affidavit of the 1st Defendant dated 19th July, 2024 he chose to respond to his two separate Notices of Motion dated 12th June, 2024 and 18th June, 2024 in one Affidavit. He had followed suit in this submission for purpose of consistency to save time. The Plaintiff relied on the following two (2) issues for determination:-
11. On the first issue - Whether a consent application on an ongoing case, which had not attracted a consent order, Judgment, or decree could be legally binding on the parties the Plaintiff submitted that reading from the entire averments of the 1st Defendants Replying Affidavit dated 19th July, 2024. He stated that;
 - a. There was no dispute that they were a consent agreement signed by the 1st Defendant and the applicant.
 - b. There was no dispute the Applicant notified the 1st Defendant that he had disowned the consent much earlier than they filed the consent application without the knowledge of the applicant as it was not served on him through any hearing notice
 - c. There could be no debate that the court did not hear nor issue consent order after the consent application was filed in court in the absence of the applicant as he was not aware that there was consent application lying in court.
12. The Plaintiff submitted that it was common knowledge that consent application was an application like any other and must be subjected to hearing by the court where the parties to the application appear before the judge and confirm clearly and loudly that they agree to be bound by the contents of the application. It was only then the court could adopt the application as its own order, decree or Judgment.
13. The Plaintiff submitted that at this stage he referred to paragraph 11 in the ruling in the case in “Wema Foundation Trust Company – Versus - County Government of Nairobi City and another[2007]eKLR”, where my brother said:

“It is trite law that the parties who would want the court to adopt a consent judgment must be present in court on the day when the document is presented for adoption and confirm the same....”
14. The Plaintiff averred that he had not only explained the obvious but have supported this by quoting the case law in the court, the same as this one based in Nairobi. As for (b) above, he said this as he had said in his application of 12th June, 2024 a court order issued by a competent court can only be set aside by the same court or a superior court on appeal. The deponent being an advocate of the High Court of Kenya ought to know this.
15. On the application dated 18th June, 2024 on contempt the Plaintiff stated that:-
 - a. The contemnor must be made aware of the order refraining him from taking certain actions. In other Words, he must have been served with the order.
 - b. The terms of the order must not be ambiguous
 - c. The Defendant must have acted in breach of the terms of the order



- d. That he breached the order willfully and deliberately
16. From the Replying Affidavit of the 1st Defendant dated 19th July, 2024 it was clear that they had not denied being served with the order. They have not denied that the terms of the order were clear. They had not denied that they went ahead and processed the tender and eventually sold the properties they were restrained from selling. What they were giving the court as excuse was that the consent signed by the parties actually set aside the court order. The said consent has exhaustively been discussed supra.
 17. The Plaintiff submitted that what the 1st Defendant was saying in paragraph 7 of his Replying Affidavit of 19th July, 2024 was an attempt to mislead the court by pleading willful ignorance of the law on consent proceedings. According to the Plaintiff ignorance of law excuses no one. What the 1st Defendant averred in paragraph 6 of his Replying Affidavit was worrying. To him it meant that one thing – were they saying that this Honorable Court just issues orders as scarecrow which clever birds can ignore and destroy the crops. Were the orders of this Honorable court mean nothing to them? They had disobeyed the order and extinguished the properties of the member of the pension scheme. They were saying yes, the properties were gone, so what can the court do. The Court could do one thing punish them in the matter provided in the law.
 18. On the second issue - whether the order issued by a competent court can be set aside by a consent application which has not even been heard by the court handling the ongoing case. The issue of where there were the remedies available to the Plaintiff/Applicant submitted that he had demonstrated clearly that the 1st Defendant had clearly admitted that they have disobeyed the order of this Honorable Court issued on 7th May, 2024 but had pleaded ignorance (willful ignorance) as a plea to the court. It was his prayer that this court grant his prayers as detailed in his application dated 18th June, 2024.
 19. On who bears the costs of the Plaintiff/ Applicant's applications dated 12th June, 2024 and 18th June, 2024, it was the Plaintiff's submission that this Honourable Court awards the Costs of his application.

B. The Written Submissions by the 1st Defendant/Respondent

20. The 1st Defendant/Respondent through the Law firm of Messrs. Muriu, Mungai and Company LLP Advocates filed their written submissions dated 29th July, 2024. Mr. Kongere Advocate submitted that there were two (2) applications, both by the Plaintiff/Applicant that fall for determination. The first, a Notice of Motion dated 12th June 2024, sought to set aside a consent dated 20th May 2024. The second, a Notice of Motion dated 18th June 2024, sought to cite the 1st Defendant/Respondent's officials for being in contempt.
21. Both applications had been responded to vide a Replying Affidavit sworn by Vincent M. Oweya on 19th July 2024. The Plaintiff had made a response vide a document curiously named 'Replying Affidavit', which he swore on 20th July 2024. The facts are, in truth, uncomplicated, but the numerous applications have tended to obscure them. And so, they got into them in some detail for context. The Plaintiff/Applicant, a member of the 1st Defendant, came to court seeking an injunction to restrain the sale of various properties listed in Tender No. KPAPS/DISP/003/2022 (the '2022 tender').
22. Although interim orders were initially granted on 8th March 2022, they were not extended on 5th April 2022. The result was that the 2022 tender was processed to its logical conclusion. The ruling on that application was ultimately delivered on 23rd May 2023, and the injunction granted. Shortly thereafter, the Plaintiff/Applicant brought a Notice of Motion dated 17th August 2023 seeking to cite the 1st Defendant/Respondent's officials for breaching the injunction.



23. Having completed processing the 2023 tender, the 1st Defendant/Respondent issued a fresh tender, Tender No. KPAPS/DISP/002/2024, in April 2024. The indefatigable Plaintiff/Applicant took out another Notice of Motion application dated 6th May 2024, sought to restrain the processing of the year 2024 tender. He obtained injunctive orders ex parte on 7th May 2024. The 1st Defendant/Respondent, considering those orders to be gravely prejudicial, sought to set them aside vide a Notice of Motion dated 14th May 2024. This application was considered ex parte, but the court did not interfere with its earlier orders. Then came the negotiations that resulted in the consent dated 20th May 2024.
24. In the meantime, the court had scheduled the ruling on the initial contempt application for delivery on 27th May 2024. The 1st Defendant/Respondent hoped that the consent would be adopted by the court on that date, but it was not to be. Instead, the ruling was deferred to 10th June 2024. On 10th June, and before the ruling was delivered, the Plaintiff/Applicant indicated that he would apply to set aside the consent, hence the Motion dated 12th June 2024. In it, the Plaintiff alleged that the consent was not to be filed before the ruling on the first contempt application was delivered. He also said that what he agreed to and what was filed, did not match.
25. While that application for setting aside was pending, the Plaintiff/Applicant brought the Motion dated 18th June 2024. The short of it was that the 1st Defendant/Respondent's officials should be punished for violating the injunction granted ex parte on 7th May 2024. The 1st Defendant's response is that on the facts, there was no legal basis for setting aside that consent which was entered into voluntarily. It mattered not that the consent had not been adopted by the court, it bound the parties once they signed it.
26. Because the consent was signed by the parties, and because that consent set aside the ex parte injunction of 7th June 2024, there was no order capable of being violated. At any rate, assuming the injunction was not set aside, any breach by the 1st Defendant was not deliberate but honest.
27. On the issues of determination, the Learned Counsel relied on the following:-
 - a. The Plaintiff/Applicant had made a case to set aside the consent;
 - b. The Plaintiff/Applicant had proven contempt by the 1st Defendant/Respondent.
28. On the analysis of the issue and on the issue of no basis to set aside the consent, the Learned Counsel submitted that they proceeded from the understanding that once parties had drawn up, signed and filed a consent, it was binding on them notwithstanding that it was yet to be adopted by the court. So that unless it could be shown that the consent was contrary to law, the court had no alternative but to adopt it. This was what they understood the Supreme Court to be saying in the case of: "Geoffrey M. Asanyo & 3 others – Versus - Attorney General [2018] eKLR".
29. They had now a legally binding consent, was there a lawful basis for setting it aside? "Intercountries Importers and Exporters Limited – Versus -Teleposta Pension Scheme Registered Trustees & 5 others [2019] eKLR", among other authorities, tell them that:-

“.....a consent Order will only be set aside if it can be demonstrated that it was procured through fraud, non-disclosure of material facts or mistake or for a reason which would enable a court set it aside.”
30. They had considered the Plaintiff's grounds for seeking to set aside the consent. The impression they were left with was that of a Plaintiff who was hedging. He wrote a letter dated 30th May 2024 to the court



stating his only complaint to be that the 1st Defendant/Respondent's advocate on record attempted to had the court adopt the consent in his absence.

31. He also wrote another letter similarly dated 30th May 2024 to the 1st Defendant/Respondent stating that his only problem was the supposed move to have the consent adopted in his absence. In both these letters, the Plaintiff did not suggest that he did not agree to the terms of the consent. Instead, he points to procedural issues that he believes, rightly or wrongly, should have preceded the adoption of the consent.
32. The Learned Counsel submitted that it was obvious to them, based on the authorities, that neither of those reasons fit within the very strict grounds for setting aside a consent. Perhaps that was why when the Plaintiff/Applicant filed his application, he did not advance any of these grounds but instead alleged mistake in entering the consent. That departure, in their considered view, was all the evidence of bad faith by the Plaintiff/Applicant that the court needed to refuse the application. But even if the alleged mistake is considered on its merits, it did not advance the Plaintiff/Applicant's case one bit. They said so because of what "Intercountries Importers (supra)" said amounted to a mistake.
33. The Plaintiff/Applicant according to the Learned Counsel was saying that he was wined and dined by the 1st Defendant almost to the point of slumber, such that the resultant consent was not the product of sound reason but was sleep induced. That argument, which was altogether without merit, was forgivable only because it was made by a layperson. But it was not one that should detain the court at all.
34. The other point made was that the Plaintiff/Applicant made corrections on the draft shared with him and sent it back to the 1st Defendant/Respondent by email. However, when the final document was presented, it had not captured the Plaintiff/Applicant's corrections, but the Plaintiff/Applicant, whose eyesight was allegedly failing, signed it without realizing that his proposed changes had not been effected.
35. With respect, this was an equally facetious argument. First, they had not been shown the evidence of comments sent to the 1st Defendant via email. Surely, an email from the Plaintiff would had been the easiest thing to avail, if any was sent. Second, when authoring the two (2) letters of 30th May 2024, the Plaintiff did not mention anything about the contents of the consent being different from what he agreed to. The belated change of tune was just but a clutching at straws.
36. Third, the minutes of the meeting which resulted in the consent have been produced to the court. The minutes were distributed to the employee's representative. They had not heard him say that the minutes were not a true reflection of what was discussed in that meeting. The terms of the consent are a mirror image of the minutes of the meeting. The Plaintiff, having discussed and agreed to the terms of the consent which he signed, could not now undo that agreement on the frivolous procedural points which were, in truth, his true complaint. The application to set aside the consent was nothing but an abuse of the court process and was for dismissal. With that dismissal, it was vain to submit on the application for committal for there will be no order capable of being disobeyed. The application for contempt, therefore, should suffer the same fate. But they should say something, just in case the court held otherwise.
37. According to the Learned Counsel, the Plaintiff/Applicant had not established contempt by the 1st Defendant/Respondent. This court, in its ruling delivered on 24th June 2024, ably treated the subject of contempt of court. They did not propose to water down that immense learning. All they would say that since the 1st Defendant/Respondent acted under the impression, reasonable they added, that the consent opened the way for it to process the year 2024 tender, then a key ingredient necessary to be established in contempt applications, was missing.



38. It was stated in the case of:- “Mukora & 5 others – Versus - Ndiho & 2 others [2023] KEELC 16322 (KLR)” 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. Honest belief that non-compliance is justified or proper is incompatible with that intent.”
39. The Learned Counsel argued that here, the 1st Defendant/Respondent was faced with an order, made ex parte, that had the potential of spelling doom on its very existence. Its first attempt at setting aside the order was by coming back to the same court. That attempt did not generate much success.
40. The next attempt was to discuss, not just with the Plaintiff/Applicant, but the representatives of the 1st Defendant/Respondent’s members, whose interests the Plaintiff/Applicant was supposedly protecting. Those representatives, and the Plaintiff/Applicant, appreciated the grave harm that the ex parte orders were causing. They mutually agreed to set them aside forthwith and for the 1st Defendant/Respondent to take the very actions that had been excluded by the order.
41. An appropriately worded consent was prepared, approved, signed and filed. Safe in the knowledge that a signed consent was as good as a signed contract, the 1st Defendant/Respondent progressed in accordance with the consent. Several weeks later, the Plaintiff/Applicant sought to rescind from that agreement. They wonder how the 1st Defendant/Respondent could undo its reliance on the contract which, they thought, it was reasonably and lawfully entitled to rely on.
42. On the whole, therefore, it was impossible to brand as willful and deliberate, the 1st Defendant’s reliance on the contract. They thought the Plaintiff/Applicant’s argument that the consent needed to be adopted by the court before it could be relied on is self-serving and at variance with the law as stated by the Supreme Court in “Geoffrey M. Asanyo (supra)”.
43. The Learned Counsel submitted that they did not think the Plaintiff/Applicant could, in fairness and conscience, look the court in the eye and say “I signed the contract allowing the 1st Defendant to process the 2024 tender, which it did, but since I did not attend court to formalize that contract, please now punish the 1st Defendant for doing exactly that which I told them they could do”. They could not think of a conduct more Kafkaesque than that.
44. In conclusion, the Learned Counsel submitted that they were driven to conclude as they invited the Court to, that the Plaintiff’s Notice of Motion dated 12th June 2024 and 18th June 2024 were both devoid of merit and are for dismissal with costs.

C. The supplementary written submissions by the Plaintiff/ Applicant

45. The Plaintiff/Applicant acting in person filed his written submissions dated 23rd September, 2024. The Plaintiff/Applicant commenced with his submissions by stating on 22nd July, 2024 this Honourable Court directed parties to file their submissions before 30th July 2024. The time given was a bit short for him and, of necessity, he had to rush and abridge everything in his submission. All the same it could still stand on its present status.
46. However, since the court had set 26th September, 2024 for mention/compliance he had decided to file a supplementary submission to the one of 29th July, 2024, so that he gave more details and clarity on the matter. This, of course, subject to leave of court, which he trusted will judiciously be granted.



47. On a detail analysis, the Plaintiff/Applicant submitted that the issues here were firstly whether the doctrine of consent ability automatically translated to a legally binding contract between the parties as claimed by the 1st Defendant/Respondent. His submission was that a consent was not a contract and his reasons, summarized in his submission dated 20th July, 2024 are as detailed below:-
- 1(a) Consent is an informal agreement between parties. Any party may change his mind and disown it.
 - 1(b) A contract is a formal agreement where the parties in writing, orally or impliedly make it clear that they want to be legally bound by its terms. A party cannot fail to perform without incurring liability for damages.
 - 2(a) A contract has known essential elements without which the contract does not exist. The main essential are offer and acceptance as well as valuable consideration which must be expressed in monetary term. See authority annexed as No. 1 in list of authorities.
 - 2(b) A consent need not have the said ingredients. What is monetary consideration to me in the consent agreement? Zero
 - 3(a) Consent agreement must be jointly recorded by parties in court as an application for moving the court. The parties must physically be present in court. This cannot be done unilaterally as the 1st defendant tried to do. Authority annexed to my submission dated 29th July, 2024 say SO.
 - 3(b) such elaborate legal process are not known in the case of a contract and court cannot come in except when there is a breach
48. The Plaintiff/Applicant submitted that all he was saying above were supported by additional authority in Supreme Court of Kenya Judgement of 10th January 2020 in “Petition no 7 of 2019 -Geoffrey Asanyo and 3 other – Versus - The Attorney General” where the apex court in paragraph 38 raised a question as to what was a consent. In Paragraph 40 of its Judgement on the Petition, the supreme court explained what constituted a consent Judgement order or decree and thus escalated the initial consent agreement into a binding contractual matter. (Authority No. 2 in the list).
49. The Plaintiff/Applicant further submitted that this was what the judgement say in paragraph 40; “Adoption of a consent by a court was a process, in the course of which a court discharges the duty of evaluating the clarity of the consent placed before it by parties and giving directions on the manner of adoption. This circumvents the risk of an unlawful order and validates the mode of adoption and compliance. Thus a consent by parties becomes an order of the court only once it has been formally adopted by the court.” It could therefore be seen that this Honourable court has no jurisdiction to interfere with an informal agreement reached by the parties and has unilaterally been sneaked into court and has not been jointly recorded, adopted and translated into a court order. This court could not delve into enquiring as to reasons why the Plaintiff/Applicant had disowned the said sneaked agreement. It lacked the jurisdiction. The very action by the 1st Defendant/Respondent to sneak the agreement unilaterally was an abuse of the judicial process and as such the consent application dated 20th May, 2024 was a nullity and was for setting aside and costs thereon be borne by 1st Defendant/Respondent.
50. The Plaintiff/Applicant submitted it was now a well settled principle that our courts normally looks for specific ingredients to determine whether the application for contempt has any merit for the court to punish the contemnors. He had already dealt with these in his earlier submission and will not repeat himself. He needed only emphasize that the 1st defendant in their replying affidavit dated 19th July, 2024 and submission dated 29th July, 2024 did not controvert the following:-



- a. That they received the court order of this Honourable court dated 7th May, 2024.
 - b. That they understand its contents and found no ambiguity whatsoever in the court order.
 - c. That they went ahead and processed the said tender on 7th June, 2024 and awarded them, the very thing that the order directed them not to do.
51. According to the Plaintiff in their submission they now seem to confess mistake and therefore in their view they had not disobeyed the order intentionally and deliberately. They had not demonstrated how the mistake came about. He did not agree with this imagination of mistake because of the following:-
- a. He did change his mind on the informal agreement he had signed before it was unilaterally sneaked in court for adoption as order of the court.
 - b. As a matter of courtesy and as a reasonably minded person, he wrote to them on 30th May, 2024 that he had changed his mind. He also informed them that he had written to court on same. He did not have any legal obligation to do so-just courtesy.
 - c. On 27th May, 2024 they sneaked the consent application to court without his knowledge. He deemed this as act of bad faith.
 - d. The court did not hear the application as the plaintiff/application had to be in court before recording and adopting it as order of court.
 - e. Despite the above on 7th June, 2024 they opened the tenders, evaluated and awarded them and entered into contract with the tenderers.
52. The above actions according to the Plaintiff/Applicant were clearly deliberate and intentional aimed at breaching the order of this Honourable court. In his view the question of mistake did not arise and premature as that plea could only be made after conviction and they had not reached there.
53. In conclusion, the Plaintiff/Applicant submitted that their court in several rulings and Judgments had made it clear that intentional contempt of court orders will be met with severe punishment to serve as a lesson to contemnors that court order were not issued in vain. To support what he was saying and he annexed authority listed as No.3 – “MNN – Versus – JMM [2022] eKLR” where in paragraphs 12 and 13 the court cited the said warnings. The contemnors mentioned in his contempt application dated 18th June, 2024 be punished in accordance with the law. The costs of the application dated 18th June, 2024 be met by the 1st Defendant.

VII. Analysis and Determination

54. I have carefully read and considered the pleadings herein the two (2) Notice of Motion applications dated 12th June, 2024 and 18th June, 2024 by the Plaintiff/Applicant, the Replying affidavit and the rival written submissions, the cited authorities, the relevant provisions of *the Constitution* of Kenya, 2010 and statutes.
55. For the Honorable Court to attain a sustainable, fair, reasonable and Equitable decision it has condensed the subject matter into the following four (4) issues fall for determination. These are: -
- a. Whether the Plaintiff has made out a case for the grant of setting aside orders for the consent dated 20th May, 2024 and if the Notice of Motion application date 12th June, 2024 is merited?
 - b. Whether the Notice of Motion application dated 18th June, 2024 on contempt of court orders is merited?



- c. Whether this Honourable Court can grant ex parte orders of inhibition from registering any transfer of all Pension Scheme properties to any third party until this Application.
- d. Who bears the costs of the Notices of Motion applications dated 12th June, 2024 and 18th June, 2024.

Issue No. a). Whether the Plaintiff has made out a case for the grant of setting aside orders for the consent dated 20th May, 2024 and if the Notice of Motion application date 12th June, 2024 is merited

56. Under this sub title, the Honourable Court shall get an indepth sight into consents and how to set them aside and if the Plaintiff has made out a case to set the consent in this instant case aside. The law on variation of a consent order is now settled to the effect that the variation of a consent order can only be on grounds that would allow for a contract to be vitiated. These grounds include but are not limited to fraud, collusion, illegality, mistake, an agreement being contrary to the policy of the Court, absence of sufficient material facts and ignorance of material facts.

57. There has been a plethora of cases developed by our Courts over this pertinent issue. Thus, for avoidance of re – inventing the wheel, I will endeavor to make reference to some of them for ease of reference and rebut my point. In the case of “Kenya Commercial Bank Ltd – Versus - Specialised Engineering Co. Limited [1982] KLR 485”, Harris J correctly held inter alia, that:-

1. A consent order entered into by counsel is binding on all parties to the proceedings and cannot be set aside or varied unless it is proved that it was obtained by fraud or collusion or by an agreement contrary to the policy of the court or where the consent was given without sufficient material facts or in misapprehension or ignorance of such facts in general for a reason which would enable the court to set aside an agreement.
2. A duly instructed advocate has an implied general authority to compromise and settle the action and the client cannot avail himself of any limitation by him of the implied authority to his advocate unless such limitation was brought to the notice of the other side.

58. Further, the case of: “Hirani – Versus - Kassam (1952), 19EACA 131”, the Court of Appeal with approval quoted the following passage from Seton on Judgments and Orders, 7th edition, Vol.1 p.124 as follows:

“Prima facie, any order made in the presence and with the consent of counsel is binding on all parties to the proceedings or action, and on those claiming under them..... and cannot be varied or discharged unless obtained by fraud or collusion, or by an agreement contrary to the policy of the Court..... or if consent was given without sufficient material facts, or in misapprehension or in ignorance of material facts, or in general for a reason which would enable the Court to set aside an agreement.”

59. Further in the same case it was held that:-

“It is now well settled law that a consent judgment or order has contractual effect and can only be set aside on grounds which would justify setting a contract aside, or if certain conditions remain to be fulfilled, which are not carried out: see the decision of this court in J. M. Mwakio – Versus - Kenya Commercial Bank Limited Civ Apps 28 of 1982 and 69 of 1983. In Purcell – Versus - F.C. Trigell Limited [1970] 3 All ER 671, Winn LJ said at 676:-



“It seems to me that, if a consent order is to be set aside, it can really only be set aside on grounds which would justify the setting aside of a contract entered into with the knowledge of the material matters by legally competent persons, and I see no suggestion here that any matter that occurred would justify the setting aside or rectification of this order looked at as a contract.”

60. Additionally, in the case of “James Muchori Maina – Versus - Kenya Power & Lighting Company Ltd [2005] eKLR” the court, approving the case of “Flora Wasike – Versus - Destimo Wamboke (1988) 1 KAR 625 at page 626” observed as follows: -

“Consent is in the form of a contract. It binds the parties. Since the time that consent was entered in court in 1999, it has not been challenged, nor has any of the parties applied to set it aside. The legal validity of a consent and principles on which it can be set aside were considered by the Court of Appeal in the case of *Kenya Commercial Bank Ltd -vs- Benjob Amalgamated Ltd. - Nairobi Civil Appeal No. 276 of 1997*, wherein the Court of Appeal applied the reasoning in the case of Flora Wasike vs- Destimo Wamboke (1988) 1 KAR 625 at page 626 where Hancox JA (as he then was) stated-

“It is now settled law that a consent judgment or order has contractual effect and can only be set aside on grounds which would justify setting a contract aside, or if certain conditions remain to be fulfilled, which are not carried out”.

That consent was binding on the parties, and can only be set aside as enunciated above by the Court of Appeal. That consent still being intact on record cannot be challenged in this appeal.”

61. Similarly, in the case of:- “John Waruinge Kamau – Versus - Phoenix Aviation Limited [2015] eKLR” the court considered the circumstances in which a consent order can be set aside and stated:-

“The circumstances under which a consent order may be set aside are grounds which would justify the setting aside of a contract, or if the conditions required to be fulfilled by the agreement have not been fulfilled. The grounds for setting aside contracts are fraud, coercion, mistake or misrepresentation.”

62. Finally, the case of:- “M & E. Consulting Engineers Limited – Versus - Lake Basin Development Authority & Another [2015] eKLR” the Court of Appeal stated as follows: -

“The circumstances under which a consent order may be set aside are grounds which would justify the setting aside of a contract, or if the conditions required to be fulfilled by the agreement have not been fulfilled. The grounds for setting aside contracts are fraud, coercion, mistake or misrepresentation.

36. In M & E. Consulting Engineers Limited – Versus - Lake Basin Development Authority & Another [2015] eKLR the Court of Appeal stated as follows:

“We re - affirm the dicta in the High Court case of Kenya Commercial Bank Limited. -Versus - Specialized Engineering Company Limited, 1982 KLR 485 as was upheld by this Court in Civil Appeal No. 43 of 1980 thereof where it was stated as follows:



1. A consent order entered into by counsel is binding on all parties to the proceedings and cannot be set aside or varied unless it is proved that it was obtained by fraud or collusion or by an agreement contrary to policy of the court or where the consent was given without sufficient material facts or in misapprehension or ignorance of such facts in general for a reason which would enable the court to set aside an agreement.
2. A duly instructed advocate has an implied general authority to compromise and settle the action and the client cannot avail himself of any limitation by him of the implied authority to his advocate unless such limitation was brought to the notice of the other side.
3. An advocate has general authority to compromise on behalf of his client, as long as he is acting bona fide and not contrary to express negative direction. In the absence of proof of any express negative direction, the order shall be binding.
4. The fact that a material fact within the knowledge of the client was not communicated to the advocate when he gave his consent to a court order is not sufficient ground for the client withdrawing his consent to the order before it is passed and entered even if the advocate concedes he would not have given his consent had he known these facts.
5. The making by the court of a consent order is not an exercise to be done otherwise than on the basis that the parties fully understand the meaning of the order either personally or through their advocates and when made, such an order is not lightly to be set aside or varied save by consent or on one or either of the recognized grounds.”

63. Now applying these elaborate legal principles to the instant case. I have extensively perused the court record. From that exercise, it is evident that the Plaintiff/Applicant and the Counsel for the Defendants/Respondents got into a consent which all the parties signed. The record further shows that the same was adopted in the absence of the Plaintiff/Applicant. It is trite law that the parties who would want to have the court to adopt a consent Judgment or order must all be physically present in court on the day when the document is presented for confirmation to the one they both signed and agreed on and adoption of the same as an order of the Court.

64. This case will only benefit from the fact that the Plaintiff/Applicant was not in court when the consent was being proposed for adoption as an order of the court. Given the foregoing, in order to sustain the spirit of fair hearing and natural justice under the provisions of Article 25 (c)and 50 (1) & (2) of *the Constitution* of Kenya, 2010, the Honourable Court will grant the prayer of the Plaintiff/Applicant and defer the adoption of the consent order to allow the parties to reach a consensus on the consent or list the suit for hearing.

ISSUE No. b). Whether the Notice of Motion application dated 18th June, 2024 on contempt of court orders is merited?

65. Under this sub - heading, the Honourable Court has deciphered that the main Substratum in this proceedings herein is one on Contempt of Court from an alleged breach and gross violation of the Court orders. It has been stated on umpteenth times that Court orders are sacrosanct. They are not a formality nor cosmetic. They have to be obeyed however erroneous they maybe. The only remedy



available is for an aggrieved party to revert back to Court seeking for either review or variation or setting aside or discharge of the said orders depending on the prevailing circumstance and surrounding facts and inferences. Certainly, the disobedience of Court order is not an available option at all. The consequences of disobedience of Court order is extremely serious as it borders on criminality capable of one forfeiting their fundamental rights and freedoms enshrined in the Bill of Rights under the Constitution.

66. The application has been brought under the provision of Order 40 Rule 3(1), 3(2), 3(3) and 4 of the Civil Procedure Rules; Section 5 of the Judicature Act (Cap. 8), Sections 1B, 3, and 3A of the Civil Procedure Act Cap 21. The application before me was filed in the year 2020. From the notes appearing on the Act it is apparent that that Section was repealed in the year 2016 vide Act No. 46 of 2016, S. 38. Section 29 of the Environment and Land Court Act provides as follows:

“29. Offences

Any person who refuses, fails or neglects to obey an order or direction of the Court given under this Act, commits an offence, and shall, on conviction, be liable to a fine not exceeding twenty million shillings or to imprisonment for a term not exceeding two years, or to both.”

67. The provision of Order 40 Rule 3 of the Civil Procedure Rules, 2010 on the consequence of breach of injunctive orders provides as follows:-

1. In cases of disobedience, or of breach of any such terms, the court granting an injunction may order the property of the person guilty of such disobedience or breach to be attached, and may also order such person to be detained in prison for a term not exceeding six months unless in the meantime the court directs his release.
2. No attachment under this rule shall remain in force for more than one year, at the end of which time, if the disobedience or breach continues, the property attached may be sold, and out of the proceeds the court may award such compensation as it thinks fit, and shall pay the balance, if any, to the party entitled thereto.
3. An application under this rule shall be made by notice of motion in the same suit.

68. Forward going, I wish to refer to the Black’s Law Dictionary 11th Edition, which defines contempt as: -

“The act or state of despising; the quality, state or condition of being despised. Conduct that defies the authority or dignity of a court or legislature. Because such conduct interferes with the administration of justice, it punishable by fine or imprisonment”.

69. At some initial point, the legal framework that governed contempt of court was the Contempt of Court Act until it’s nullification in the case of:- “Kenya Human Rights Commission – Versus - Attorney General & another [2018] eKLR Constitutional Petition No. 87 of 2017”.

70. However, the court in the case of:- “Samuel M. N. Mweru & Others – Versus - National Land Commission & 2 others [2020] eKLR” while discussing the legal framework on contempt of court stated as follows:-

“The applicable law as regards contempt of court existing before the enactment of the Contempt of Court Act was restated by the Court of Appeal in Christine Wangari Gachege – Versus - Elizabeth Wanjiru Evans & 11 Others, [2014] eKLR. In that case the Court found that the English law on committal for contempt of court under Rule 81.4 of the English



Civil Procedure Rules, which deals with breach of Judgment, order or undertakings, was applied by virtue of Section 5 (1) of the *Judicature Act* which provided that:

“The High Court and the Court of Appeal shall have the same power to punish for contempt of court as is for the time being possessed by the High Court of Justice in England, and that power shall extend to upholding the authority and dignity of subordinate courts.”

This section was repealed by Section 38 of the *Contempt of Court Act* of 2016, and as the said Act has since been declared invalid, the consequential effect in law is that it had no legal effect on, and therefore did not repeal Section 5 of the *Judicature Act*, which therefore continues to apply. In addition, the substance of the common law is still applicable under Section 3 of the *Judicature Act*. This Court is in this regard guided by the applicable English Law which is Part 81 of the English Civil Procedure Rules of 1998 as variously amended, and the requirement for personal service of court orders in contempt of Court proceedings is found in Rule 81.8 of the English Civil Procedure Rules.”

71. As restated in the above case law, the law then applicable in contempt of court proceedings is the provision of Section 5(1) of the *Judicature Act*, Cap. 8 which mandates that the court relies on the applicable law in England at the time the alleged contempt is committed. In the case of “Samuel M. N. Mweru (Supra) the Court dealing with an application for contempt of court based on disobeyed of a court order stated:

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

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

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

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

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

“The applicant must prove to the required standard (in civil contempt cases which is higher than in criminal cases) that:-



- a. the terms of the order (or injunction or undertaking) were clear and unambiguous and were binding on the defendant;
- b. the defendant had knowledge of or proper notice of the terms of the order;
- c. the defendant has acted in breach of the terms of the order; and
- d. the defendant's conduct was deliberate.”

75. I will therefore be analyzing each element as set out above and in close application to the instant case. In so doing I will be looking at the court order issued by the court. The provision of Section 29 of the Environment and Land Court, No. 19 of 2011 is clear to the effect that:-

“Any person who refuses, fails or neglects to obey an order or direction of the Court given under this Act, commits an offence, and shall, on conviction, be liable to a fine not exceeding twenty million shillings or to imprisonment for a term not exceeding two years, or to both

76. It is an established principle of law as was held in the case of “Kristen Carla Burchell – Versus - Barry Grant Burchell, Eastern Cape Division Case No. 364 of 2005” in order to succeed in civil contempt proceedings, an Applicant has to prove (i) the terms of the order, (ii) Knowledge of these terms by the Respondents, (iii). Failure by the Respondent to comply with the terms of the order.

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

- i. Whether there was a valid Court order made on 7th May, 2024 by this Honourable Court
- ii. Whether the Defendants/ Respondents herein were served with or was aware of the orders made on 7th May, 2024.
- iii. Whether the order as sought and extracted was clear and unambiguous
- iv. Whether the trustees of the 1st Defendant are guilty of contempt of Court order herein issued.

78. In the instant case, from the very onset and without mincing words, based on the surrounding facts and inferences herein, the Honourable court out rightly states that it is not at all persuaded that there is any Contempt of Court committed by the trustees of the 1st Defendant/Respondent as alleged by the Plaintiff/Applicant for the following reasons: - Firstly, I hold that it is clear that the order issued by the court was clear and unambiguous. It was addressed to the both Parties, hence binding upon them. The core ground is that this Honorable Court made the orders on 7th May, 2024 this Honourable Court issued interim injunctive Order restraining the 1st Defendant/Respondent from processing tender for sale of properties which belong to members of Kenya Ports Authority Pension Scheme which it had floated through Daily Nation Newspapers of 26th April 2024. A copy of the Court Order was annexed as exhibit J001.

79. According to the Plaintiff/Applicant, on 7th June 2024 the 1st Defendant publicly opened the said tender and allowed public participation. Annexed as exhibit J002 was a tabulation of analysis of the bids received and opened on 7th June, 2024. They total only a sum of Kenya Shillings Nine Hundred Million (Kshs. 900, 000.00).

80. On the other hand, the 1st Defendant/Respondent admitted that the order that the 1st Defendant/Respondent was accused of disobeying was the same one that the parties set aside by the consent dated 20th May 2024. Once that consent was signed by both parties on 20th May 2024, it became binding on



the parties, notwithstanding that the court was yet to adopt it as an order of the court. Nonetheless, none of the parties could resale from the consent and none could act contrary to it. Concomitantly, the parties to that consent were entitled to act pursuant to the consent.

81. Secondly, on the alleged contemnor ought to have knowledge of or proper notice of the terms of the order. According to the Plaintiff/Applicant, the 1st Defendant/Respondent were well aware of the Orders of the Court but chose to blatantly disobey the said Orders by unlawfully and illegally making an attempt to take occupation of the Suit Property. The Plaintiff/Applicant's application dated 18th June, 2024 was filed to ensure that the rule of law is preserved and that the 1st Defendant/Respondent and its trustees are held accountable for failure to comply with the Orders of the Court.
82. Thirdly, the allegations blatantly meted out by the Plaintiff/Applicant to the effect that the 1st Defendant/Respondent and its trustees had willfully disobeyed these orders. Additionally, the Honourable Court fully concurs with the aversions made by the 1st Defendant/Respondent that the Plaintiff/Applicant herein has failed to adduce any evidence to prove the alleged contravention of the said Court Order.
83. Fourthly, the Court fully concurs with the aversions rightfully that this court, in its ruling delivered on 24th June 2024, ably treated the subject of contempt of court. They did not propose to water down that immense learning. All they would say that since the 1st Defendant/Respondent acted under the impression, reasonable they added, that the consent opened the way for it to process the year 2024 tender, then a key ingredient necessary to be established in contempt applications, was missing. The Learned Counsel submitted that here, the 1st Defendant/Respondent was faced with an order, made ex parte, that had the potential of spelling doom on its very existence. Its first attempt at setting aside the order was by coming back to the same court. That attempt did not generate much success
84. To this end, therefore, the Honourable Court is not satisfied that the Plaintiff/Applicant has proved its case for contempt of Court orders by this Honourable Court given on 7th May, 2024 against the 1st Defendant/Respondent's trustee. This court is unable to find any merit in the instant application. The court's jurisdiction to punish parties for their disobedience of court orders exists in the *Environment and Land Court Act* provisions cited by the applicant as well as under common law. The court also has jurisdiction to bring a long drawn out litigation to an expedited end in accordance with the overriding objective of Sections 1A, 1B and 3A of the *Civil Procedure Act*, Cap. 21 provisions cited by the applicant. However any punitive action against a party for disobedience must be taken only in the clearest of cases especially due to the fact that the process of punishment for contempt of court orders is quasi-criminal in nature may include loss of a subject's liberty.
85. At this juncture, I wish to refer to the Court of Appeal in "Woburn Estate Limited – Versus - Margaret Bashforth [2016] eKLR " emphasized that:-

“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 Limited [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.”

In the result we find that the learned judge erred in the decision he reached holding the appellant liable in contempt and the punishment he imposed.”



86. As stated above, contempt proceedings are of a criminal nature and involve, if proved, loss of liberty. The Applicant must therefore endeavor to prove all facts relied on by way of evidence beyond reasonable doubt. In the instant application this Court is being asked to summon the trustees of the 1st Defendant/Respondent to show cause why they should not be punished. As I have noted there must be a prima facie case of contempt of court set out against them, which has not been sufficiently rebutted, and orders must have already issued convicting them of contempt before this court can summon them and in this case contempt has not been proved.
87. In the long run under this sub heading, it is the finding of this Honourable Court that the Plaintiff/Applicant has not proved to the required standard that the 1st Defendant/ Respondent as cited were in brazen disobedience of the Court orders issued by this Honourable Court on 7th May, 2024. Therefore, prayer (b) of the Notice of Motion application dated 18th June, 2024 fails.

ISSUE C: Whether this Honourable Court can grant ex parte orders of inhibition from registering any transfer of all Pension Scheme properties to any third party until this Application

88. Under this sub title we shall examine whether the Honourable Court can issue ex parte orders on inhibition. The issue for determination is as to whether the applicant is entitled to an order of inhibition ex parte to preserve the status of the suit land. The provision of Section 68 of the [Land Registration Act](#) of 2012 provides as follows:-
1. The court may make an order (hereinafter referred to as an inhibition) inhibiting for a particular time, or until the occurrence of a particular event, or generally until a further order, the registration of any dealing with any land, lease or charge.
 2. A copy of the inhibition under the seal of the court, with particulars of the land, lease or charge affected, shall be sent to the Registrar, who shall register it in the appropriate register.
 3. An inhibition shall not bind or affect the land, lease or charge until it has been registered. when there is good reason to preserve, or stay the registration of dealings, with respect to a particular parcel of land for a temporary period.
89. The general principle that will apply is that the court exercises discretion judiciously and in good faith, for a proper purpose and take into account all relevant factors and is reasonable in the circumstances of the case in granting an order of inhibition. At this stage the court is dealing with whether to preserve the substratum of the case by way of an inhibition and maintenance of status quo.
90. On the issue of maintenance of status quo to preserve the property the court held in the case of “Joel Mugambi Mukira & 2 others (for and on behalf of Kimathi tenants welfare group) – Versus - County Government of Nyeri [2019] eKLR” that;

“In land matters the maintenance of status quo order is now literally synonymous with the proceedings. As was held by the Court of Appeal in the case of *Mugah -Versus - Kunga* [1988] KLR 748, in land matters status quo orders should always be issued for purposes of preserving the subject matter. The court's practice directions vide Gazette Notice No. 5178/2014 Practice direction No. 28 (k) gives the court the leeway and discretion to make an order for status quo to be maintained until determination of the case.”



91. Further in the case of in the case of “Joel Kipkurui Arap Koech – Versus - Alice Wambui Magandu 3 Others [2018] eKLR” the court held that;

“In that case, the court granted an injunction on the general principle that it is better to safeguard and maintain the status quo for a greater justice than to let the status quo be disrupted by not granting an interlocutory injunction and after hearing the case, find that a greater injustice has been occasioned.

The guiding principle of the overriding objective is that the Court should do justice to the parties before it and their interests must be put on scales.

Both the plaintiff and the I St Defendant are claiming the suit property. In my view, it is only fair to make orders that safeguard and maintain the status quo until the suit is heard and determined.

Having looked at the facts that have emerged in this case and the evidence adduced by way of affidavits, it is clear that the Plaintiff has established a prima facie case with a probability of success against the Defendants.

In my view, it is clear that the plaintiff has shown his right over the suit property. As regards irreparable damage, I take the view that should the suit land be alienated, the Plaintiff will have lost what he regards as his land and which may not be quantified in damages. The balance of convenience would tilt in favour of the plaintiff in order to safeguard the subject matter of the suit pending hearing and determination.”

92. For these reasoning, I find that it would be in the interest of justice to order for an inhibition, restricting the registration or any disposition of the suit property until this suit is heard and determined. Therefore, based on this I hold that the application is allowed with regards to prayer 4 of the notice of Motion application dated 18th June, 2024.

ISSUE No. d). Who bears the costs of the Notice of Motion applications dated 12th June, 2024 and 18th June, 2024

93. It is trite law that the issue of costs is at the discretion of Court. Costs mean Costs mean the award a party is awarded at the conclusion of a legal action or proceedings in any litigation. The Black Law Dictionary defines cost to means: -

“the expenses of litigation, prosecution or other legal transaction especially those allowed in favour of one party against the other”

94. The provision of Section 27 of the Civil Procedure Act, Cap. 21 grants the High Court discretionary power in the award of costs which ordinarily follow the event unless the Court for good reasons orders otherwise. Section 27 (1) of the Civil Procedure Act provides as follows:-

“(1) Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid; and the fact that the court or judge has no jurisdiction to try the suit shall be no bar to the exercise of those powers: Provided that



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

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

VIII. Conclusion and Disposition.

99. Ultimately in view of the foregoing detailed and expansive analysis to the rather omnibus application, the Court arrives at the following decision and make the orders below:-
- a. That the Notice of Motion application dated 12th June, 2024 be and is hereby found to have merit and the same is allowed.
 - b. That the Notice of Motion application dated 18th June, 2024 be and is hereby partially found to have merit and is hereby allowed only in regards to prayer 4.
 - c. That this Honourable Court hereby sets aside the duly executed Consent order terms and conditions stipulated thereof and dated 7th May 2024 for being presented to court in the absence of Plaintiff/Applicant.
 - d. That this Honourable Court do and hereby under the provision of Section 68 (1), (2) & (3) of the *Land Registration Act*, No. 3 of 2012 and Regulation 79 (1), (2) & (3) of the Land Registration (General) Regulations, 2017 directing the Land Registrar, Mombasa to forthwith register an Inhibition against any transfer and/or any dealing pertaining to and connected with of all Pension Scheme properties to any third party until this suit is heard and finally determined.



- e. That for expediency sake the matter to be heard on 3rd March, 2025. There be a mention on 13th November, 2024 for Pre – Trial Conference pursuant to the provisions of Order 11 of the Civil Procedure Rules, 2010.
- f. That there shall be no orders as to costs.

It Is So Ordered Accordingly.

RULING DELIVERED THROUGH THE MICROSOFT TEAM VIRTUAL MEANS, SIGNED AND DATED AT MOMBASA THIS 15TH DAY OF OCTOBER 2024.

.....

HON. MR. JUSTICE L. L. NAIKUNI
ENVIRONMENT AND LAND COURT AT
MOMBASA

Ruling delivered in the presence of:

- a. M/s. Firdaus Mbula, the Court Assistant;
- b. Mr. James Oganda Oluoch acting in person as the Plaintiff/Applicant.
- c. Mr. Billy Kongere Advocate for the 1st Defendant/Respondent.
- d. No appearance for the 2nd Defendant/Respondent.

