



Sikalieh (Being Chairman of and suing in public interest an on behalf of Karen Langata District Association) v Kenya Railways Corporation & 5 others; National Environment Management Authority & another (Interested Parties) (Environment & Land Petition E028 of 2024) [2024] KEELC 7479 (KLR) (7 November 2024) (Ruling)

Neutral citation: [2024] KEELC 7479 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND PETITION E028 OF 2024**

**AA OMOLLO, J
NOVEMBER 7, 2024**

BETWEEN

SAMORA SIKALIEH (BEING CHAIRMAN OF AND SUING IN PUBLIC INTEREST AN ON BEHALF OF KAREN LANGATA DISTRICT ASSOCIATION) PETITIONER

AND

**KENYA RAILWAYS CORPORATION 1ST RESPONDENT
CHINA RAILWAY DESIGN CORPORATION 2ND RESPONDENT
APEC CONSORTIUM CO. LIMITED 3RD RESPONDENT
MINISTRY OF ROADS & TRANSPORT 4TH RESPONDENT
PRINCIPAL SECRETARY, MINISTRY OF ROADS & TRANSPORT 5TH RESPONDENT
THE ATTORNEY GENERAL 6TH RESPONDENT**

AND

**NATIONAL ENVIRONMENT MANAGEMENT AUTHORITY INTERESTED PARTY
KENYA FOREST SERVICE INTERESTED PARTY**



RULING

1. For determination is the Motion application dated 9th September, 2024 brought under the provisions of section 5 of the Judicature Act and section 63 of the Civil Procedure Act together with all enabling provisions of the law. The Petitioner/Applicant seeks for orders;
 1. Spent
 2. Spent
 3. That this Honourable Court be pleased to Order the following persons named below being the Managing Director of the 1st Respondents, Contract Manager for 2nd and 3rd Respondents, the 3rd and 4th Contemnors herein being the officer holders in the 4th and 5th Respondents be and are hereby condemned to personally pay a fine in such sum that the Court may direct for each of them and or be and are hereby committed to civil jail or both for contempt/disobedience of the Orders given on 15th August, 2024 by (Hon. Justice A. Omollo) of the Environment and Land Court of Kenya at Nairobi in this matter:
 1. Mr. Phillip J. Mainga – (Managing Director for 1st Respondent)
 2. Mishek Waititu – (Contract Manager for the 1st and 2nd Respondent)
 3. Hon. David Chirchir – (The 4th Respondents)
 4. Mohamed Daghar – (The 4th Respondents)
 4. That the Officer in Charge of Ngong and or Karen Police Station do ensure maintenance of law and order of enforcement of the Order of this Court given on 15th August, 2024.
 5. The Contemnors and the Respondents do pay the costs of the application.
2. The application is grounded on the facts stated on its face inter alia;
 - i. Despite having knowledge of the order of 15th August, 2024, the contemnors who are accounting & principal officers of the 2nd and 3rd Respondents have continued with construction works of the subject project at the Department of Veterinary Services farm at Ngong within the Nairobi Metropolitan under the instructions, supervision or command of the 1st, 2nd, 3rd and 4th Contemnors herein on daily basis every working day of the week, have threatened and intended to continue with the said acts of contempt.
 - ii. More particularly, the Applicant/Petitioners have captured photographic evidence of massive continuous works at the said subject site project at the Department of Veterinary services farm at Ngong within the Nairobi Metropolitan where the Ngong area main project station is under construction on 16th August, 2024, 26th August, 2024 and 5th September, 2024 which is prima facie evidence of repeated wilful and deliberate disobedience of Court Orders in this Court with impunity.
3. The application is indicated to be supported by the affidavit of Samora Sikalieh annexed to the Petition; the affidavits of Oscar Litoro advocate and Samora Sikalieh both sworn on 9th September, 2024 and such further grounds to be adduced at the hearing. They reiterated the grounds set on the face of the motion.



4. In addition, Mr. Litoro deposes that the Respondents and their officers have wilfully refused to obey court orders and will continue to do so unless the orders sought are granted. Mr. Sikalieh deposes that despite having knowledge of the order of 15th August, 2024, the persons named in the application (contemnors) as accounting principals of the 1st – 3rd Respondents have continued with constructions works on the subject property at the department of Veterinary Services, Ngong.
5. He deposes that on diverse dates spread through the month of August and September, 2024, he personally visited or drove to the site of the subject project in particular at the Department of Veterinary Services farm in Ngong within the Nairobi Metropolitan where construction of the Ngong area main project station had commenced prior to the subject Order. That he captured photographic evidence of massive continuous works at site of the project on 16th August, 2024, 26th August 2024 and 5th September, 2024 which clearly show repeated wilful and deliberate disobedience of Court Orders in this Court with impunity for more than 2 weeks after the Order was given by this Court.
6. He attached the photographs describing it as evidence of trucks, excavators, excavations and ongoing works undertaken on 16/8/2024, station levelling works and Roads at the main Railway Ngong Station, excavation and levelling of the road/roadworks to the station being undertaken on 21st and 26th August, 2024 and 5th September, 2014 and a certificate of accuracy of the photos.
7. Eng. Mishek Waititu one of alleged contemnors swore a replying affidavit dated 18th September, 2024 in opposition to the application. He deposed that he serves in the capacity of the Contract Manager for the 2nd & 3rd Respondents who solely is responsible for providing consultancy services and are in no way involved in any construction services. He denied being a contract manager for the 1st Respondent.
8. He continued that the agreement entered between the 1st, 2nd & 3rd Respondent, the 2nd and 3rd Respondent were contracted to provide consultancy services of the said project. That as per the contract dated November, 2023, the scope of their work is limited to advising conducting and oversight & preparation on the ESIA report and the Resettlement Action Plan. He denies that they are in disobedience of the order issued on 15th August, 2024.
9. Mr. Philip Mainga the Managing Director of 1st Respondent similarly swore a replying affidavit on 23rd September, 2024 in opposition to the orders sought against him. He denied that there were works being undertaken under supervision of the 1st Respondent. He contends that the photos produced by the Petitioner have no probative value and they do not demonstrate disobedience of the order.
10. He deposed that upon perusal of the photos, he noted the following;
 - a. They are photographs of what appear to be parked lorries and tractors on a construction site and no proof has been adduced that they belong to the 1st Respondent.
 - b. From the photographs, one cannot tell whether this is a construction site belonging to the 1st Respondent or that it is a construction site within the Department of Veterinary Services at Ngong.
 - c. There are no electronic date and time stamps form the device which allegedly took the photographs to show when these photographs were allegedly taken.
11. The parties filed respective written submissions in support of and against the application dated 9th September, 2024. In arguing the court to punish the contemnors, the petitioner submitted that it is only the 2nd Respondent who challenged the application. That the order of 15th August, 2024 was clear and unambiguous and it was issued in the presence of counsels for all the parties.



12. Notwithstanding the foregoing, the Petitioner submits that the Respondents continued with construction activities as shown in the photographic evidence showing 90% complete structure at Ngong Town Station. That all the Respondents are artificial persons hence the holders of the respective accounting officers' names disclosed in the application be held liable.
13. The Petitioner/Applicant added that this court has power under section 29 of *Environment and Land Court Act* and Order 40 rule 3(1) of the *Civil Procedure Act* grants the court power to punish for contempt.
14. It is trite law that contempt proceedings are quasi-criminal as they touch on the liberty of individuals accused of disobeying court orders if found guilty. Therefore, the standard of proof required is beyond that of balance of probabilities as held in the case of *Mutitika vs Baharini Farm Ltd (1985) eKLR*. The 1st – 3rd Respondents filed replying affidavits contesting the alleged disobedience. Engineer Mishek Waititu deposed that the 2nd and 3rd Respondents are Consultants and are in no way engaged in any construction activities. He referred to the consultancy agreement of November, 2023 which contained their terms of reference.
15. The further affidavit sworn on 4th October, 2024 didnot contest the averment by the 2nd and 3rd Respondent that their terms of reference does not include construction works. Mr. Philip Mainga cited on behalf of the 1st Respondent casted doubt on the probative value of the photographs produced by the Petitioner. Photo 1 which is said to have been taken on 16th August, 2024 and which the Petitioner stated as evidence of excavations and ongoing works. What is visible in the picture is some structure with no visible activities (no human beings are identifiable) and a stationary tractor. Further, this structure on face of the photo could not have been constructed in one day (between 15th August, 2024 and 16th August, 2024).
16. With regard to photographs at pages 19 – 21 there is nothing to show any ongoing building works (Nos. 2 – 4). The Petitioner describes it as evidence of levelling of the road works but it appears not to show any new road or human activities featuring in the photos. Again, with this general explanation it falls below the threshold of standard of proof required of the Petitioner. Lastly, the pictures dated 5th September, 2024 on pages 22 – 25 looks similar. I have compared them with the one taken on 16th August, 2024. I observed that the photo of 16th August, 2024 has something which looks like a 2nd beam covered in some green net while the latter one (of 5.9.2024), the net is removed with the structure showing the two beams. The close similarity infers that there were no visible additional external works between the two dates on the structure.
17. There is some concrete and sand deposited on the front of the structure in the photos at page 22 – 25 but no visible activities. What looks like a new murram road also has stagnant trucks beside it, nothing much to deduce from them about ongoing activities. The Petitioner solely relied on the photos as the evidence of on-going construction in contempt of the court order. He ought to have explained what was added in the structure shown on photo dated 16th August, 2024 that confirmed more works had been undertaken as at 5th September, 2024. For the levelling of the roads, probably a video may have added weight to the Petitioner's case.
18. In the case of *Samuel M. N. Mweru & Others v National Land Commission & 2 others [2020] eKLR* discussed the applicable law on contempt of court as follows: -

“It is an established principle of law that in order to succeed in civil contempt proceedings, the applicant has to prove (i) The terms of the order, (ii) Knowledge of these terms by the Respondent, (iii) Failure by the Respondent to comply with the terms of the order.”



19. In the case before me, the order required the Respondents not to undertake any activities on the project including not undertaking any construction pending hearing and determination of the application. From the foregoing analysis of the evidence presented, I am not persuaded that the Petitioner has proved the disobedience on the part of the alleged contemnors to the required standard set by law. I conclude by holding the application dated 9th September, 2024 is without merit. It is dismissed with costs in the cause.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 7TH DAY OF NOVEMBER, 2024

A. OMOLLO

JUDGE

