



Mathu & 2 others All Jointly Suing as and on Behalf of Kyuna Neighbours Associaton & another v National Environment Management Authority & 4 others; Director General, Nairobi Metropolitan Services (Interested Party) (Environment and Land Appeal E075 of 2022) [2023] KEELC 21318 (KLR) (2 November 2023) (Ruling)

Neutral citation: [2023] KEELC 21318 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND APPEAL E075 OF 2022**

**OA ANGOTE, J
NOVEMBER 2, 2023**

BETWEEN

**KIMANI MATHU, ATUL SHAH AND CHRIS NDEGWA, ALL
JOINTLY SUING AS AND ON BEHALF OF KYUNA NEIGHBOURS
ASSOCIATON 1ST APPELLANT
ISAAC MRUTTU SUING ON BEHALF OF SHANZU ROAD RESIDENTS
ASSOCIATION 2ND APPELLANT**

AND

**THE NATIONAL ENVIRONMENT MANAGEMENT AUTHORITY 1ST
RESPONDENT
MAAR PETROLEUM LIMITED 2ND RESPONDENT
THE UNIVERSITY OF NAIROBI 3RD RESPONDENT**

AND

**YUSUF ABDI HUSSEIN 1ST CONTEMNOR
OMAR IBRAHIM ABDI 2ND CONTEMNOR**

AND

**DIRECTOR GENERAL, NAIROBI METROPOLITAN SERVICES INTERESTED
PARTY**



RULING

1. Before this court is a Notice of Motion application filed by the Appellants/Applicants dated 5th May 2023. Through this application, the Appellants have sought for orders that:
 - a. That this Honourable Court be and is hereby pleased to cite Maar Petroleum Limited, Yusuf Abdi Hussein and Omar Ibrahim Abdi jointly and severally for contempt of the Hon. Court for their willful and deliberate disobedience and defiance of the Order of the Hon. Court of 24th April 2023, in contemptuously proceeding with construction works on the impugned project on Plot LR No. 1870/111/71 Westlands Sub-County, Nairobi County; and sentence them each to a custodial sentence of not less than two (2) years, and each a monetary fine for the sum not less than Kenya Shillings Three Million (KShs. 3,000,000/-) for contempt of the Hon. Court.
 - b. That the Honourable Court be pleased to issue any further Orders and/ or direction as may be necessary to give effect to the Orders sought herein and that it deems fit in the interest of justice.
 - c. That the costs of this application be provided for on a full indemnity basis.
2. The application is based on the grounds on the face of it and on the Affidavit sworn in support by QS Kimani Mathu (the Chairman Kyuna Neighbours Association), who deposed that the Court issued a clear and unequivocal order on 24th April 2023 directing that the prevailing status quo be maintained, meaning that there should be no further development on the suit property until delivery of the Rulings.
3. Mr. Mathu deposed that the contemnors have notice and knowledge of the subject order; that the said order was not only pronounced in court, but was made in Court in the presence of their advocate on record, Mr. Abdirizak, and that the Appellants/Applicants also effected service of the same on the contemnors.
4. It was Mr. Mathu's averment that the contemnors have obstinately engaged in defiant conduct; that it is in disobedience of the restraint against further construction on the suit property and that the contemnors, through Mr. Abdirizak, misled this court on 24th February 2023 that supposedly the construction had been concluded, a fact they knew to be untrue while the subject property is evidently a construction site. Mr. Mathu attached copies of time stamped photographs of the purported ongoing construction.
5. The Respondents did not file any response to the application.

Submissions

6. Counsel for the Applicant submitted that the law demands compliance with valid court orders. Counsel relied on the 7-judge bench decision of the Court of Appeal in Republic v Tony Gachoka & Another [1999] eKLR, Attorney General v Times Newspaper Ltd [1974] AC 273 at page 309 and Halsbury's Laws of England, Volume 9 (4th edition) paragraph 27.
7. Counsel also relied on the Court of Appeal's decision in Shimmers Plaza Limited v National Bank of Kenya Limited [2015] eKLR, where it condemned the trend of interfering with the administration of law and ultimately perverting the course of justice in unrestrained disobedience of court orders.



Analysis and Determination

8. The issue for determination by this court is whether the 2nd Respondent, Yusuf Abdi Hussein and Omar Ibrahim Abdi should be cited for contempt.
9. It is not disputed that on 24th April 2023, this court issued orders pending delivery of its ruling with respect to the application dated 2nd September 2022. The ruling remains pending. The said application dated 2nd September 2022 was filed by the Plaintiffs, who are seeking for an order of interlocutory injunction, restraining the 2nd Respondent from undertaking or continuing with the construction works on the suit property, pending the hearing and determination of the appeal.
10. In the Order dated 24th April 2023, this court directed that the prevailing status quo be maintained, meaning that there should be no further development on the suit property until the delivery of the ruling.
11. In their application, the Appellants aver that the contemnors had notice and knowledge of the subject order, the order having been made in Court in the presence of their advocate on record, Mr. Abdirizak, and the Appellants/Applicants having effected service on the same parties.
12. It is trite that the power of a court to hold a party in contempt is for the purpose of upholding the rule of law. That is what was stated in *Teachers Service Commission v Kenya National Union of Teachers & 2 Others*[2013] eKLR:

“The reasons why the Courts will punish for contempt of Court then is to safeguard the rule of law which is fundamental in the administration of justice. It has nothing to do with the integrity of the judiciary or the Court or even the personal ego of the presiding judge...it is about preserving and safeguarding the rule of law.”

13. The *Black's Law Dictionary* (Ninth Edition) defines Contempt of Court as:-

“Conduct that defies the authority or dignity of a Court. Because such conduct interferes with the administration of justice, it is punishable usually by fine or imprisonment.”

14. The contempt alleged in this matter is civil contempt, which is with respect to disobedience of the orders of this court. *Halsbury's Law of England*, Vol 9(1) 4th Edition draws a distinction between criminal contempt and civil contempt in the following manner:

“Contempt of Court can be classified as either criminal contempt, consisting of words or acts which impede or interfere with the administration of justice or which creates substantial risk that the course of justice will be seriously impeded or prejudiced, or contempt in procedure, otherwise known as civil contempt consisting of disobedience to Judgment, Orders or other process of Court and involving in private injury.’ A court without contempt power is not a court. The contempt power (both in its civil and criminal form) is so innate in the concept of jurisdictional authority that a court that could not secure compliance with its own judgments and orders is a contradiction in terms, an “oxymoron.” Contempt power is something regarded as intrinsic to the notion of court; even obvious, I would say. In the common lawyer’s eye, the power of contempt “is inherent in courts, and automatically exists by its very nature.”



15. Section 29 of the [Environment and Land Court Act](#) provides 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.”

16. The substantive law governing contempt proceedings is found in Section 5 of the [Judicature Act](#), which provides:

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

(2) An order of the High Court made by way of punishment for contempt of court shall be appealable as if it were a conviction and sentence made in the exercise of the ordinary original criminal jurisdiction of the High Court.”

17. The English law applicable in England at the time the alleged contempt was committed is applicable in this country. This position was affirmed by the Court of Appeal in [Christine Wangari Chege v Elizabeth Wanjiru Evans & Others](#) (2014) eKLR where it observed as follows:-

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

The High Court of Justice in England is that level of the court system in England, comprising three divisions, the Queen's Bench, the Chancery and Family Divisions. That court draws its jurisdiction to punish for contempt of court from both the statute, namely the *Contempt of Court Act*, 1981 and the Common Law. But the procedure to be followed in commencing, prosecuting and punishing contempt of court cases was, until 2012, as will shortly be explained, provided for by Order 52 Rules 1 to 4 of the *Rules of the Supreme Court (RSC)*, made under the *Supreme Court or Judicature Act*, 1873 (or simply the *Judicature Act*, 1873). The *Judicature Act*, 1873 abolished a cluster of courts in England and Wales dating back to medieval periods, some with overlapping judicial powers, and in their place Supreme Court of Judicature, which must not be confused with the Supreme Court of the United Kingdom which was established only on 1st October, 2009 assuming the judicial features of the House of Lords.”

18. The English law that is applicable in this matter is Part 81 of the *Civil Procedure (Amendment No 3) Rules* 2020. The courts in Kenya have applied a condensed approach to the elements of civil contempt. In [Cecil Miller v Jackson Njeru & Another](#) [2017] eKLR, the court outlined the ingredients for contempt of court orders as follows :-

- a. The terms of the order/or injunction or undertaking, were clear and unambiguous and were binding on the defendants;
- b. The Defendant has knowledge of or proper notice of the terms of the order;



- c. The Defendant has acted in breach of terms of the order and;
 - d. The Defendant's conduct was deliberate.”
19. These elements were similarly laid down in *North Tetu Farmers Company Ltd v Joseph Nderitu Wanjohi* [2016] eKLR, where the court relied on the text titled '*Contempt in Modern New Zealand*' which provides as follows:
- “There are essentially four elements that must be proved to make the case for civil contempt. The applicant must prove to the required standard (in civil contempt cases which is higher than civil cases) that:-
- (a) the terms of the order (or injunction or undertaking) were clear and unambiguous and were binding on the defendant;
 - (b) the defendant had knowledge of or proper notice of the terms of the order;
 - (c) the defendant has acted in breach of the terms of the order; and
 - (d) the defendant's conduct was deliberate.”
20. There is no doubt that the orders of this court, requiring the Respondents to cease any further construction were clear, unambiguous and binding upon them. As to whether the Respondents had knowledge and notice of the said order, the Applicants have rightly asserted that the Respondents' Counsel were present in court when the said orders were made. This is reflected on the record of the court.
21. The Appellants have also exhibited an Affidavit of Service which shows that the order of the court dated 24th April 2023 was served on the Respondents on 25th April 2023. The Appellant's process server deposed that he served the orders on the guard and masons that were present on the project site and that he explained the contents and effect of the said order.
22. Indeed, the Court of Appeal has rendered itself on this matter, and held that knowledge of an order by a contemnor's advocate suffices for contempt proceedings. In *Shimmers Plaza Limited v National Bank of Kenya* (2015) eKLR, the Court of Appeal held as follows:
- “Would the knowledge of the judgment or order by the advocate of the alleged contemnor suffice for contempt proceedings? We hold the view that it does. This is more so in a case such as this one where the advocate was in Court representing the alleged contemnor and the orders were made in his presence. There is an assumption which is not unfounded, and which in our view is irrefutable to the effect that when an advocate appears in court on instructions of a party, then it behoves him/her to report back to the client all that transpired in court that has a bearing on the client's case.”
23. The element of proper knowledge and notice of the court's order has been satisfied.
24. The other element to be satisfied is whether the Respondents are in breach of the terms of the order. The Appellants have presented photographs dated 4th May 2023 which show construction workers on the suit property at work. These photographs are time-stamped and have duly been accompanied by a certificate confirming the accuracy and manner of production of the computer printouts.



25. Indeed, while the level of activity on the suit property appears minimal, they all the same constitute a breach of this court's orders, which should have ceased all construction activities on the suit property. These activities have been undertaken deliberately.
26. The Appellants have sought to cite Yusuf Abdi Hussein and Omar Ibrahim Abdi for the 2nd Respondent's contemptuous actions. It is trite that a company always acts through its Directors. The two have not denied that they are Directors of the 1st Respondent. The two have also not denied that the workers captured in the photographs were working under their directions.
27. This court therefore finds the 2nd Respondent, together with the named contemnors, to be in contempt of court. The Appellants' application is therefore allowed and the following orders do issue:
 - a. A declaration be and is hereby issued that Maar Petroleum Limited, Yusuf Abdi Hussein and Omar Ibrahim Abdi are in contempt of the Orders of this Court having willfully and deliberately disobeyed and defied the Order of this Court of 24th April 2023, by proceeding with the construction works on LR No. 1870/111/71 Westlands Sub-County, Nairobi County.
 - b. The two named contemnors, Yusuf Abdi Hussein and Omar Ibrahim Abdi to mitigate before the sentence is meted out.
 - c. The two named contemnors, Yusuf Abdi Hussein and Omar Ibrahim Abdi, to pay the costs of the application.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 2ND DAY OF NOVEMBER, 2023.

O. A. ANGOTE

JUDGE

In the presence of;

Mr. Lusi for Appellant/Applicant

No appearance for the Respondent

Court Assistant - Tracy

