



**Atlas Towers (Kenya) Limited v Nkatha & 2 others (Civil Appeal  
E134 of 2023) [2025] KEHC 7680 (KLR) (4 June 2025) (Judgment)**

Neutral citation: [2025] KEHC 7680 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MERU  
CIVIL APPEAL E134 OF 2023  
SM GITHINJI, J  
JUNE 4, 2025**

**BETWEEN**

**ATLAS TOWERS (KENYA) LIMITED ..... APPELLANT**

**AND**

**CECILIA ANTONY NKATHA ..... 1<sup>ST</sup> RESPONDENT**

**SILAS NKARICHIA ..... 2<sup>ND</sup> RESPONDENT**

**SAFARICOM KENYA LIMITED ..... 3<sup>RD</sup> RESPONDENT**

*(An Appeal arising from the Ruling of the learned Chief Magistrate  
Hon. L. Mutai delivered on 11/8/2023 in Isiolo ELC Case No. E032/2021)*

**JUDGMENT**

1. This Appeal arises from the Ruling of the learned Chief Magistrate Hon. L. Mutai delivered on 11/8/2023 in Isiolo ELC Case No. E032/2021 wherein the court allowed the application dated 11/3/2023 by the 1<sup>st</sup> Respondent herein and the Plaintiff in the trial court, against the Appellant herein, the 2<sup>nd</sup> Respondent herein and the 3<sup>rd</sup> Respondent herein, who were the Interested Party, the 1<sup>st</sup> Defendant and the 2<sup>nd</sup> Defendant in the trial court respectively, for Contempt of Court. In its impugning Ruling, the trial court sentenced the 3<sup>rd</sup> Respondent and the Appellant to pay a fine of Ksh. 500,000/= or in default to each serve 1 year imprisonment.
2. Aggrieved by the said Ruling, the Appellant set forth the following grounds in the Memorandum of Appeal dated 21/8/2023;
  1. The learned Trial Magistrate erred in law and fact in failing to find that no contempt proceedings could be commenced against the Appellant's directors without personal service of the orders and Penal Notice against them.



2. The learned trial magistrate failed to find that the provisions of Order 51, Rules 1 & 2, Order 40 Rules 3 & 8 of the Civil Procedure Rules, 2010 and Section 3 and 3A of the *Civil Procedure Act* Cap 21 Laws of Kenya were not properly invoked and neither were the said orders applicable since there was no injunctive order issued against the Appellant or its directors capable of being enforced or breached.
3. The learned trial magistrate failed to find that the 1<sup>st</sup> Respondent failed to tender any evidence to demonstrate that there was wilful and deliberate disobedience of the status quo orders allegedly issued on 25<sup>th</sup> January, 2022.
4. The learned trial magistrate misdirected herself by holding that there was an order directed at the Appellant or its directors capable of being enforced.
5. The learned trial magistrate misdirected herself by condemning the Appellant and/or its directors unheard by sentencing them to a prison term of two (2) years without offering them an opportunity for mitigation or notice to show cause why they should not be committed to jail for contempt of status quo orders contrary to the constitutional dictates of Articles 25 (c) and Article 50 of *the Constitution* of Kenya, 2010 which provides that the right to fair trial shall not be limited and fair hearing respectively.
6. The learned trial magistrate erred in law and fact in failing to consider the Appellant's response to the contempt application and submissions therein and in doing so arrived at a wrong decision.

### Submissions

3. The Appellant through the firm of Hashim & Lesaigor Associates Advocates filed submissions dated 14/1/2025. Counsel faulted the trial court for improperly and irregularly invoking its jurisdiction under Order 40 Rule 3 of the Civil Procedure Rules by punishing the Appellant for a non-existent injunctive order. According to him, the trial court lacked jurisdiction to entertain the Respondent's application for contempt because there was no injunctive order in existence capable of being enforced against the Appellant, and cited Owners of Motor Vessel "Lilian S" v Caltex Oil (Kenya) Limited (1989) KLR 1 and Samuel Kamau Macharia & Another v Kenya Commercial Bank Limited & 2 Others (2012) eKLR. He faulted the trial court for finding the Appellant guilty of contempt without any evidence to demonstrate that the alleged disobedience was willful and deliberate, and relied on Econet Wireless Kenya Ltd v Minister of Information & Communication of Kenya & Another (2005) KLR 828, Gatharia K. Mutikika v Baharini Farm Limited (1985) KLR 227, Sheila Cassatt Issenberg & Watoto World Centre v Antony Machatha Kinyanjui (Civil Suit 19 of 2020) [2021] KEHC 5692 (KLR), Carey v Laiken, 2015 SCC 17 (16<sup>th</sup> April, 2015), Republic v Ahmad Abolfathi Mohamed & Another (2018) eKLR and Mbugua v *County Government of Nakuru & another (Environment & Land Case 111 of 2024)* [2024] KEELC 5125 (KLR) (Environment and Land) (11 July 2024) (Ruling). He submitted that the trial court's action of sentencing the Appellant before mitigation amounted to condemning it unheard, and cited Muruatetu & another v Republic; Katiba Institute & 5 others (Amicus Curiae) [2017] KESC 2 (KLR).
4. The 1<sup>st</sup> Respondent through the firm of J.O Ondieki & Company Advocates filed submissions dated 2/4/2025 urging that the orders of 25/1/2022 were issued in the presence of the parties herein and/or their advocates. Counsel maintained that the contemnors willfully disobeyed the court orders by continuing to construct the telecommunication mast and installing communication gadgets despite the fact that there were court orders to the contrary. Counsel relied on Sheila Cassatt Issenberg & another v Antony Machatha Kinyanjui (Supra) in urging the court to dismiss the appeal with costs.



5. The 2<sup>nd</sup> Respondent did not file any submissions.
6. The 3<sup>rd</sup> Respondent through the firm of Gikera & Vadgama Advocates filed Submissions dated 16/4/2025 urging that a person cannot be held in contempt of court unless they have been personally served with the court order or can be shown to have had actual knowledge of its existence, and cited *Shimmers Plaza Limited v National Bank of Kenya Limited (Civil Appeal 33 of 2012) [2015] KECA 945 (KLR) (Civ) (18 February 2015) (Ruling)* and *Sheila Cassatt Issenberg & another v Antony Machatha Kinyanjui (Supra)*. The trial court was faulted for failing to afford the Appellant and the 3<sup>rd</sup> Respondent an opportunity to mitigate before sentencing, thus violating the principles of natural justice and Article 50 (1) of *the Constitution*. Counsel relied on *Bryce Broadcast & Technologies (K) Ltd v Makotsi & another (Miscellaneous Civil Application E032 of 2023) [2024] KEHC 2152 (KLR) (27 February 2024) (Ruling)* and *Kimanzi v Mwangangi (Civil Appeal 187 of 2017) [2023] KECA 86 (KLR) (3 February 2023) (Judgment)* to fortify those submissions.

### **Determination**

7. I have considered the appeal herein, the trial court's ruling which is the subject of this appeal as well as the submissions by counsels.
8. From the grounds of appeal, the issue for determination is whether the contempt of court proceedings against the Appellant and the 3<sup>rd</sup> Respondent were properly instituted.
9. The essential elements to be proved in contempt of court proceedings were discussed in *Samuel M. N. Mweru & Others v National Land Commission & 2 others [2020] eKLR* 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"
10. In *Fred Matiang'i the Cabinet Secretary, Ministry of Interior and Co-ordination of National Government v Miguna Miguna & 4 others [2018] eKLR*, the Court of Appeal held; "When courts issue orders, they do so not as suggestions or pleas to the persons at whom they are directed. Court orders issue ex cathedra, are compulsive, peremptory and expressly binding. It is not for any party; be he high or low, weak or mighty and quite regardless of his status or standing in society, to decide whether or not to obey; to choose which to obey and which to ignore or to negotiate the manner of his compliance. This Court, as must all courts, will deal firmly and decisively with any party who decides to disobey court orders and will do so not only to preserve its own authority and dignity but the more to ensure and demonstrate that the constitutional edicts of equality under the law, and the upholding of the rule of law are not mere platitudes but present realities."
11. On 25/1/2022, the trial court adopted a consent by the parties herein consequently allowing the Appellant's application dated 17/12/2021 and granted leave to the Appellant and the 3<sup>rd</sup> Respondent to file responses to the application dated 7/12/2021. Upon request by Mr. Mukira for the 2<sup>nd</sup> Respondent, the court directed that the status quo prevailing then be maintained until 26/4/2022. It is difficult to discern what the applicants specifically sought in the applications dated 17/12/2021 and 7/12/2021 because the full particulars therein and the responses thereto have not been disclosed, to properly appreciate the context within which the status quo orders were issued. Be that as it may, a determination must be made one way or another. In its replying affidavit in opposition to the application for contempt dated 11/3/2023, the deponent cited lack of knowledge of the order of 25/1/2022 as the reason for its alleged non-compliance. It was further deposed that the status quo order was obtained long after the Appellant had already completed construction of the mast/



- communication tower on the 1<sup>st</sup> Respondent's property on 31/12/2021, and thus there was no deliberate intent to disobey it.
12. The record is clear that on 25/1/2022, Mr. Ondieki was present for the 1<sup>st</sup> Respondent, Mr. Mukira was present for the 2<sup>nd</sup> Respondent, Mr. Oyiado appeared for the 3<sup>rd</sup> Respondent while Mr. Jarso represented the Appellant herein, and thus the contention that the Appellant was unaware of the orders of 25/1/2022 is manifestly unfounded. The Appellant and the 3<sup>rd</sup> Respondent cannot feign knowledge of the order of 25/1/2022, because they were represented by counsel who were present in court when it was issued.
  13. I find that the Appellant and the 3<sup>rd</sup> Respondent had knowledge of the terms of the status quo orders of 25/1/2022, which they disobeyed. While the Appellant contended that construction of the mast had already been completed as at 31/12/2021, the 1<sup>st</sup> Respondent, in her replying affidavit dated 17/1/2024 insisted that the Appellant proceeded with the construction to completion, in total disregard of the status quo orders.
  14. In the circumstances therefore, I find that the Appellant and the 3<sup>rd</sup> Respondent, fully aware of the orders of 25/1/2022 and which were extended on 8/2/2022, wilfully and deliberately disobeyed them by proceeding unperturbed to complete the construction of tower and mast.
  15. On whether the Appellant and the 3<sup>rd</sup> Respondent were condemned unheard in contravention of their rights under Article 50 of *the Constitution*, the specific orders sought by the 1<sup>st</sup> Respondent in her application dated 11/3/2023 were; “c) That the 2<sup>nd</sup> defendant and interested party be cited for contempt of this honourable court's orders of 25/01/2022 which orders were also extended on 08/02/2022. d) That it's clear that the 2<sup>nd</sup> defendant and interested party are clearly in breach of this honourable court orders.”
  16. Once the trial court had found the Appellant and the 3<sup>rd</sup> Respondent to have been in contempt, they ought to have been required to show cause why they should not be committed to civil jail.
  17. In *Oilfield Movers Limited v Zahara Oil and Gas Limited* [2020] eKLR, the court (F. Tuiyott J, as he then was), rendered as follows; “The upshot is that I find that Zahara Oil & Gas Limited, Peter Nduru and John Patrick Barr are in contempt of Court for disobedience of the Court order issued on 31<sup>st</sup> July 2019. Yet before handing down any sanction for the said disobedience, this Court will accommodate the contemnors and give them another 14 days from today to implement the order of 31<sup>st</sup> July 2019 failing which:- i. The Defendant will not be heard by this Court or be allowed to participate in these proceedings until the contemnors purge their act of contempt. ii. The contemnors will be invited to offer mitigation prior to sentencing.”
  18. Guided by the dictum in *Oilfield Movers Limited* (Supra), I find that in sentencing the Appellant and the 3<sup>rd</sup> Respondent to pay a fine of Ksh. 500,000 or in default to each serve 1 year imprisonment, without affording them an opportunity to mitigate and probably purge their contempt, to the said extent trial court erred.
  19. Before I pen off, I must point out that an order for the maintenance of status quo is by its nature an injunctive order, and thus the trial court's invocation of the provisions of Order 40 Rule 3 of the *Civil Procedure Act*, was apt.
  20. The upshot from the foregoing analysis is that the Appellant's appeal is merited and it is allowed. The sentence meted upon the Appellant and the 3<sup>rd</sup> Respondent is hereby set aside.



21. The matter should be mentioned before the trial court for the contemnors to be accorded an opportunity to mitigate before the sentence is meted.
22. Mention on 10/6/2025 before the trial court.

**DATED AND DELIVERED AT MERU THIS 4<sup>TH</sup> JUNE, 2025**

**S.M. GITHINJI**

**JUDGE**

APPEARANCES:

Mr. Saigor for the Appellant.

Mr. Og'won holding brief for Ms. Opondo for 3<sup>rd</sup> Respondent.

