



**Samruddha Resources (K) Limited v County Government of Taita-Taveta
(Petition E018 of 2021) [2024] KEHC 176 (KLR) (19 January 2024) (Ruling)**

Neutral citation: [2024] KEHC 176 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
PETITION E018 OF 2021
OA SEWE, J
JANUARY 19, 2024**

BETWEEN

SAMRUDDHA RESOURCES (K) LIMITED PETITIONER

AND

THE COUNTY GOVERNMENT OF TAITA-TAVETA RESPONDENT

RULING

1. There are two applications pending ruling before the Court in this matter. The first of them is the Notice of Motion dated 26th May 2023, filed by the petitioner seeking that the respondent's Governor, County Secretary and County Executives in charge of Finance and Enforcement be cited for contempt of court. The application was canvassed orally on 19th September 2023 and fixed for ruling on 19th October 2023. In the interim, the respondent filed an application dated 11th October 2023 (the 2nd application) under Article 159 of the Constitution of Kenya and Rules 3 and 16(2) of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 seeking the following orders:
 - (a) Spent
 - (b) That pending the hearing and determination of the Motion or until further orders, the Court be pleased to stay, suspend and/or arrest the delivery of its ruling on the contempt application scheduled for 19th October 2023.
 - (c) That pending the hearing and determination of the Motion or until further orders, the Court be pleased to stay or suspend its orders of injunction issued on 2nd March, 2023.
 - (d) That the Court be pleased to arrest the delivery of its ruling of the contempt application scheduled for 19th October 2023.



- (e) That the Court be pleased to discharge, vary or set aside the orders of injunction issued on 2nd March 2023.
2. The application was premised on the grounds that on 2nd March 2023, the petitioner obtained ex parte orders of injunction pending appeal, restraining the respondent from collecting a sum of Kshs. 60,080,143/=, without full disclosure of all the material facts. In particular, the respondent averred that the petitioner failed to disclose to the Court that it had, on 11th January 2023, entered into a Debt Acknowledgment Agreement to settle the sum of Kshs. 55,469,873/=; or that it paid the sum of Kshs. 4,000,000/= pursuant to Clause 2 of that Debt Agreement, being instalments for 11th, 13th and 20th January 2023. Thus, the respondent prayed that delivery of the ruling in respect of the contempt application be suspended until the issues raised in this application are addressed.
 3. The application was premised on the affidavit of the respondent's County Attorney, John Mwang'ombe Mwakio sworn on 11th October 2023, in which the respondent explained that the petitioner has been mining iron ore and conducting other business in Taita Taveta County for a considerable period of time; and that in the course thereof, the petitioner has accrued arrears in terms of taxes, including transport cess, business permits, parking fees, rates, fines and other taxes. The respondent averred that, as a result of the accumulated debt, the parties entered into a Debt Acknowledgment Agreement dated 11th January 2023 in which the total sum was agreed at Kshs. 55,469,873/=, which was to be paid in agreed instalments as set out in Clause 2 of the Debt Agreement.
 4. The respondent further averred that, without disclosing the Debt Agreement, the petitioner filed a Notice of Motion for injunction pending appeal, and obtained an order on 2nd March 2023 restraining the respondent from collecting the sum of Kshs. 60,080,143/= in respect of transportation cess. The respondent took issue with the fact that the petitioner obtained interim injunction without disclosing that it had paid Kshs. 4,000,000/= pursuant to Clause 2 of the Debt Agreement, being instalments of 11th, 13th and 20th January 2023. Hence, the respondent accused the petitioner of an attempt to steal a march on it by obtaining an interim ex parte injunction without full disclosure. It therefore sought, not only that the ruling on the contempt application be arrested, but also that the injunction order of 2nd March 2023 be discharged, varied or set aside.
 5. In response to the application, the petitioner filed a Replying Affidavit sworn by Parag Pawar on 19th October 2023. According to the petitioner, the attempt by the respondent to derail the ruling on the petitioner's contempt application is mischievous and in bad faith. At paragraph 5 of the Replying Affidavit, the petitioner explained that it was coerced into signing the Debt Agreement to enable it continue to trade and carry on its mining operations. It therefore asserted that the same is illegal and was the subject of this suit, which is presently on appeal. The petitioner further averred that the respondent had several opportunities to defend itself; and that Mr. Bwire acted for the defendant in Mombasa ELC Petition No. E014 of 2023. Thus, the petitioner urged for the dismissal of the instant application contending that it is an abuse of the process of the Court.
 6. With the leave of the Court, the respondent also filed a Supplementary Affidavit sworn on 27th October 2023 by Advocate Bwire Okano. He, in essence, reiterated that:
 - (a) The petitioner deliberately failed to disclose the terms of the Debt Agreement;
 - (b) The respondent demanded the debt of Kshs. 55,469,873/= as mutually agreed in the Debt Agreement, and not the alleged sum of Kshs. 60,080,143/=; and
 - (c) The sum of Kshs. 4,000,000/= was payment made pursuant to the Debt Agreement and not the alleged sum of Kshs. 60,080,143/=.



7. Needless to say that, consequent upon the filing of the second application, the ruling in respect of the contempt application could not be delivered on 19th October 2023 as anticipated. Directions were thereafter given on 23rd October 2023 that the respondent's application would be determined on the basis of the affidavits filed and therefore no submissions were taken. Given the nature of the applications, I propose to first dispose of the 2nd application as its outcome will determine whether or not to proceed and determine the 1st application.
8. A perusal of the proceedings to date shows that, in effect, prayers 1 and 2 of the respondent's Notice of Motion dated 11th October 2023 are spent. What remains for consideration are prayers 4 and 5, namely;
 - (a) That the Court be pleased to arrest the delivery of its ruling on the contempt application; and,
 - (b) That the Court be pleased to discharge, vary or set aside the orders of injunction issued on 2nd March 2023.
9. Having given careful consideration to the application, the affidavits filed in respect thereof and the written submissions filed, and granted the foregoing residual prayers, the issues for determination are:
 - (a) Whether sufficient cause has been shown for the discharge, varying or setting aside of the orders for injunction dated 2nd March 2023; and
 - (b) Whether the ruling in respect of the contempt application ought to be arrested; and if so, to what end?

A. On the setting aside of the order of injunction pending appeal:

10. The petitioner's application for injunction pending appeal was filed herein on 2nd February 2023. It was expressed to have been filed under Articles 23(3) & 159(2) & (3) of the Constitution as well as Sections 1A & 1B of the Civil Procedure Act for the following orders:
 - (a) That the application be certified urgent.
 - (b) That the respondent be restrained by way of an injunction pending appeal from collecting from the petitioner Kshs. 60,080,143/= on account of amounts claimed allegedly for "transportation cess" or any further sums on account thereof or howsoever else pending the hearing and determination of the application inter partes.
 - (c) That the respondent be restrained by way of an interim injunction from collecting from the petitioner Kshs. 60,080,143/= on account of amounts claimed allegedly for "transportation cess" or any further sums on account thereof or howsoever else pending the hearing and determination of the petitioner's intended appeal.
 - (d) That the costs of the application be awarded to the petitioner.
11. The said application was duly served on the respondent for hearing on 2nd March 2023 and an affidavit of service to that effect filed. Accordingly, there having been no appearance for or by the respondent on the 2nd March 2023, the Court granted prayer 2 ex parte, pending further directions on the application. The Order was extracted and issued on 3rd March 2023. Further directions were thereafter given on 16th March 2023 for the disposal of the injunction application inter partes. To date, that application is yet to be heard inter partes; having been overtaken by the petitioner's application for contempt.
12. In the circumstances, and granted that the substantive Petition has been determined, the best course would have been for the parties to agitate their respective grievances at the inter partes hearing of the



application for injunction pending appeal. Consequently, my considered view is that the request for the discharge, varying or setting aside of the order of 2nd March 2023 on the basis only that the existence of a Debt Agreement was not disclosed by the petitioner is premature and is therefore hereby declined.

B. On Whether The Ruling In Respect Of The Contempt Application Ought To Be Arrested; And If So, To What End:

13. The Notice of Motion dated 26th May 2023 was filed by the petitioner pursuant to Sections 1A, 1B, 3A and 63 of the *Civil Procedure Act*, Chapter 21 of the Laws of Kenya, and the inherent powers of the Court, for the following orders against the respondent, the County Government of Taita Taveta:
 - (a) Spent
 - (b) That the respondent's Governor, County Secretary and County Executives in charge of Finance and Enforcement be held to be in contempt of court and appropriate punishment including a fine and a term of civil jail be imposed on them.
 - (c) That the respondent be ordered to refund to the petitioner the sum of Kshs. 4,000,000/= wrongfully extorted by the respondent in breach of the Court's Order of 2nd March 2023.
 - (d) That the costs of the application be awarded to the petitioner.
14. The application was premised on the grounds that, by a judgment and order of the Court made on 28th July 2022, the Court dismissed the Petition herein. The petitioner subsequently filed an application for injunction pending appeal on 2nd February 2023 whereupon an interim injunction was granted on 2nd March 2023 restraining the respondent from collecting from the petitioner Kshs. 60,080,143/= pending appeal. It was averred that, although the said order was duly served on the respondent on 3rd March 2023, it proceeded to enforce the collection of the sum aforementioned by impounding and immobilizing the trucks hired by the petitioner to transport its mined ore.
15. The petitioner accordingly averred that, given the respondents' deliberate and wanton disregard for the Court's orders and the rule of law, it is only fair and just that the respondent's Governor, County Secretary and County Executives in charge of Finance as well as Enforcement be found to be in contempt, that and stringent penalties be imposed upon them. The petitioner also mentioned that the respondent continues to interfere with and/or impede the course of justice by pursuing their contumelious and malevolent conduct without any regard or respect for the dignity of this Court or the rule of law.
16. The application was supported by the affidavit sworn on 26th May 2023 by the manager of the petitioner, Mr. Parag Pawar, in which the aforementioned grounds were explicated. In addition, the petitioner annexed to the Supporting Affidavit photocopies of photographs pertaining to the impounding of the petitioner's hired trailers and receipts to augment their assertion that the respondent wrongfully extracted the sum of Kshs. 4,000,000/= from the respondent in breach of the orders of the Court.
17. In response to the application, the respondent filed Grounds of Opposition dated 18th September 2023, contending that:
 - (a) The application is defective and incompetent and is for dismissal in limine.
 - (b) The Governor, the County Secretary and the County Executive in charge of Finance were not parties to the proceedings and were never served with any Court Order or application in relation to the matter.



- (c) The application offends the rules of natural justice and the right to fair trial as guaranteed under Article 50 of the Constitution.
 - (d) The application offends the express provisions of Section 21 of the Government Proceedings Act and Order 29 of the Civil Procedure Rules.
 - (e) The prayers sought in the application are summary in nature and are not available against the respondent as government and is subject to the provisions of the Government Proceedings Act and Order 29 of the Civil Procedure Rules.
 - (f) The orders sought in the application are draconian in nature and cannot issue in the circumstances of the case.
 - (g) The application is riddled by ulterior motives and is thus an abuse of the court process.
18. Accordingly, the respondent prayed that the application be either struck out or dismissed with costs. As has been pointed out herein above, the application was argued and was awaiting ruling when the instant application was filed. The basic reason for arrest of ruling is manifest at paragraphs 7 to 13 of the Supporting Affidavit, namely:
- (a) That there exists a Debt Agreement in the sum of Kshs. 55,469,873/= and not the alleged sum of Kshs. 60,080,143/=; and
 - (b) The sum of Kshs. 4,000,000/= paid by the petitioner was payment made pursuant to the Debt Agreement and not for cess.
19. It is therefore plain that, instead of placing the evidence set out in the affidavits of Mr. Mwangombe and Mr. Bwire before the Court for purposes of the contempt application, the respondent opted to rely on Grounds of Opposition instead. I therefore see the instant application as a belated attempt to defend the contempt application. It for that reason that I find no justification for arresting the ruling of the Court in respect of the contempt application. The respondent's application dated 11th October 2023 (the 2nd application) is accordingly hereby dismissed with costs.

C. The Contempt Application Dated 26th June 2023:

20. Although directions were given on the 6th June 2023 for the filing of written submissions, none had been filed by the parties as of 19th September 2023. Thus, the application was urged orally by learned counsel, to which end, counsel for the petitioner, Mr. Ondego, relied on the Supporting Affidavit together with the annexures thereto in urging the Court to find the respondent in contempt of court. He relied on Oil Fields Limited v Zabara Oil and Gas Limited 2020. eKLR for the proposition that, where a party is represented by an advocate, the party is deemed to be aware of the court order and therefore there would be no need for personal service of the order.
21. Mr. Bwire likewise relied on the respondent's Grounds of Opposition and argued that the application is misconceived in that the orders sought can only be made against the holders of the respective offices upon service. In his submission, the standard of proof in contempt applications is similar to the applicable burden in criminal proceedings, namely, beyond reasonable doubt. Counsel further submitted that it was imperative for the petitioner to comply with the applicable provisions of the law governing the production of electronic evidence; which was not done. Accordingly, he submitted that the photographs relied on by the petitioner are inadmissible in evidence and ought to be expunged from the record. He accordingly prayed for the dismissal of the application.



22. The *Contempt of Court Act*, 2016, having been declared invalid on 9 November 2018 for lack of public participation in Kenya Human Rights Commission v Attorney General & Another 2018. eKLR, the applicable law in this regard is that which obtained prior to the passing of the *Contempt of Court Act*; as guided by Section 5 of the *Judicature Act*, Chapter 8 of the Laws of Kenya. That provision states:
- (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 the 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 criminal jurisdiction of the High Court.”
23. In this posturing, I find succour in the decision of Hon. Nyamweya, J (as she then was) in case of *Republic v Kajiado County & 2 others Ex parte Kilimanjaro Safari Club Limited* 2019. eKLR, in which it was held:
- “26. 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 v 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.”
27. This section was repealed by section 38 of the Contempt of 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...”
24. In addition to Section 5 of the *Judicature Act*, Order 40 Rule 3(1) of the *Civil Procedure Act* is explicit in respect of disobedience of injunctive orders that:
- 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.”
25. It is instructive that the application was also anchored on Section 63 of the *Civil Procedure Act*, which gives the Court the general power to issue injunctive orders by way of supplemental proceedings.



Needless to say that court orders must be strictly obeyed. As was aptly stated by Romer LJ in *Hadkinson v Hadkinson* 1952. ALLER 567:

“It is the plain and unqualified obligation of every person, against, or in respect of whom an order is made by a court of competent jurisdiction to obey it unless and until that order is discharged. The uncompromising nature of this obligation is shown by the fact that it extends even to cases where the person affected by an order believes it to be irregular or even void.

For, a person who knows of an order, whether null or valid, regular or irregular cannot be permitted to disobey it. It would be most dangerous to hold that the suitors or their solicitors could themselves judge whether an order was null or valid. Whether it was regular or irregular, that they should come to the court and not take upon themselves to determine such question. That the course of a party knowing of an order which was null and irregular, and who might be affected by it, was plain, he should apply to court that it might be discharged. As long as it exists, it should not be disobeyed.” (Also see *Econet Wireless Kenya Ltd v Minister for Information & Communication of Kenya & Another* 2005. KLR 828)

26. The same principles were restated in *Samuel M. N. Mweru & Others v National Land Commission & 2 others* 2020. eKLR by Mativo, J (as he then was) 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. Upon proof of these requirements the presence of willfulness and bad faith on the part of the Respondent would normally be inferred, but the Respondent could rebut this inference by contrary proof on a balance of probabilities. Perhaps the most comprehensive of the elements of civil contempt was stated by the learned authors of the book *Contempt in Modern New Zealand* who succinctly stated: -

“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....”

27. Hence, the four elements of contempt that the petitioner needed to prove are:

- (a) was there an order of the court;
- (b) was it clear and unambiguous;
- (c) was it served and
- (d) was it wilfully and intentionally disobeyed?



28. That an order of injunction pending appeal was granted on 2nd March 2023 is not in dispute. There is likewise no dispute as to the clarity of the order as extracted. What was disputed is service of the order upon the respondent and the alleged contemnors, who are all officers of the respondent. Accordingly, the key issue for determination in respect of the contempt application is whether service was effected; for obedience is dependent on service.

29. According to the respondent, the order was duly served. In proof thereof an Affidavit of Service sworn by Ondego Dan on 8th March 2023 was filed herein on 10th March 2023 to demonstrate that the Order was served on 2nd March 2023 upon M/s John Bwire & Associates. A photocopy of the email, together with proof that the message was read by the recipient, was annexed to the Affidavit of Service and marked Annexure 'OD-1'. In the premises, I am satisfied that indeed the order was served on the respondent. I entirely agree, in this regard, with the position taken by Hon. Tuiyott, J (as he then was) in *Oil Fields Ltd v Zabara Oil and Gas Limited* (*supra*) that personal service is no longer necessary where a party is represented by counsel. The learned judge held:

“Where a party clearly acts and shows that he had knowledge of a Court order, the strict requirement that personal service must be proved is rendered unnecessary. That should be the correct legal position and I subscribe to it.

20. This position has been endorsed repeatedly by the Court of Appeal. See for instance *Shimmers Plaza Limited v National Bank of Kenya* 2015. eKLR.

21. It would seem that the rationale for the rule is to protect the integrity and dignity of Court orders. To excuse a contemnor who has knowledge of a Court order simply because he has not been personally served is to open up Court orders and process to contemptuous and cynical disobedience.

22. And where a party is represented by an advocate, the party is deemed to have knowledge of a Court order if the party's advocate is aware of it.”

30. Indeed, in *Shimmers Plaza Limited v National Bank of Kenya Limited* 2015. eKLR the Court of Appeal held:

“...this Court has slowly and gradually moved from the position that service of the order along with the penal notice must be personally served on a person before contempt can be proved... Kenya's growing jurisprudence right from the High Court has reiterated that knowledge of a court order suffices to prove service and dispense with personal service for purposes of contempt proceedings. For instance, Lenaola, J in the case of *Basil Criticos v Attorney General and 8 Others* 2012. eKLR pronounced himself as follows:

“...the law has changed and as it stands today knowledge supersedes personal service... where a party clearly acts and shows that he had knowledge of a Court Order; the strict requirement that personal service must be proved is rendered unnecessary.”

31. The Court of Appeal further stated:

“...The notice of the order is satisfied if the person or his agent can be said to either have been present when the judgment or order was given or made; or was notified of its terms by telephone, email or otherwise. In our view, 'otherwise' would mean any other action that can be proved to have facilitated the person having come into knowledge of the terms of the judgment and/or order. This would definitely include a situation where a person



is represented in court by counsel. Once the applicant has proved notice, the respondent bears an evidential burden in relation to willfulness and mala fides disobedience...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."

32. It was to no avail therefore for Mr. Bwire to depose that he was not acting for the respondent at the time the order was made; granted that, according to the court record, Notice of Appointment of Advocates dated 30th March 2021 was filed on behalf of the respondent on even date by the firm of M/s John Bwire & Associates; and that the respondent was duly represented on 28th July 2022 by Mr. Muliro who was then holding brief for Mr. Bwire. I am therefore satisfied as to service of the Order dated 2nd March 2023.
33. As to whether there was willful disobedience, the petitioner relied on the documents annexed to the Supporting Affidavit. They comprise photocopies of images taken of certain motor vehicles; but quite apart from the fact that their registration numbers are not visible, there is no supporting evidence to demonstrate their connection with the petitioner. In the same vein, the Remittance Advices exhibited at pages 19 to 22 are in respect of payments made by the petitioner itself. The allegation at paragraph 14 of the Supporting Affidavit that the sum of Kshs. 4,000,000/= was extracted from it remains just that; an allegation. I was also unable to link the dates appearing on the Remittance Advices, namely the 5th October 2023 with the petitioner's application dated 26th May 2023.
34. Thus, all considered, I am not satisfied that the petitioner proved disobedience of the order dated 2nd March 2023 to the requisite standard. It is to be remembered that in matters contempt of court, the standard of proof is above that which is applicable to ordinary civil cases. The Court of Appeal expressed itself in this regard in *Mutitika v Baharini Farm Ltd* 1985. eKLR thus:
- "In our view, the standard of proof in contempt proceedings must be higher than proof on the balance of probabilities, almost but not exactly, beyond reasonable doubt...The standard of proof beyond reasonable doubt ought to be left where it belongs, to wit, in criminal cases. It is not safe to extend it to an offence which can be said to be quasi-criminal in nature."
35. In the premises, it is my considered finding that the petitioner's application lacks merit in so far as willful disobedience was not demonstrated to the requisite standard. The application dated 26th June 2023 is, likewise, here by dismissed with costs.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 19TH DAY OF JANUARY 2024

OLGA SEWE

JUDGE

