



**Omondi & another v Angasa & 3 others (Civil Case 10 of 2022)  
[2024] KEHC 16902 (KLR) (7 February 2024) (Ruling)**

Neutral citation: [2024] KEHC 16902 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MOMBASA  
CIVIL CASE 10 OF 2022  
F WANGARI, J  
FEBRUARY 7, 2024**

**BETWEEN**

**MICHAEL OKACH OMONDI ..... 1<sup>ST</sup> PLAINTIFF**

**RONALD LUKORITO WANYAMA ..... 2<sup>ND</sup> PLAINTIFF**

**AND**

**WILLIAM ATATI ANGASA ..... 1<sup>ST</sup> DEFENDANT**

**TREVOR NYAMBASO ATATI ..... 2<sup>ND</sup> DEFENDANT**

**EXTROPICA TRADING CO LTD ..... 3<sup>RD</sup> DEFENDANT**

**EXTROPICA MERCHANT LIMITED ..... 4<sup>TH</sup> DEFENDANT**

**RULING**

1. The Plaintiffs filed a Notice of Motion dated 1/3/2022 seeking orders inter alia that there be a temporary injunction issued for all the 3140 boxes of energy drinks imported by the Plaintiffs through the 4<sup>th</sup> Defendant via entry No. 22EMKIM400283826, and which were warehoused in Extropica Building in Embakasi. The Plaintiffs sought to have the said boxes be detained in a neutral warehouse mutually agreed by the parties.
2. Through the order granted on 2/3/2022 and issued on 3/3/2022, the temporary injunction was granted pending the hearing and the determination of the application. Matter was fixed for 16/3/2022 for directions. The service of the said orders was confirmed through the Affidavit of Service dated 8/3/2022. However, the execution of the said order was frustrated by the Defendants hence the filing of the Notice of Motion dated 9/3/2022, which was under certificate of urgency.
3. The application sought to have an order issued that the OCS Embakasi Police Station do provide security/ assistance in the execution of the court order issued on 2/3/2022. The application was allowed and an order to that effect issued on 10/3/2022. The Affidavit of Service dated 15/3/2022 states that



the said order was not served upon the Defendants due to their absence and it was returned to the court unexecuted.

4. Subsequent to other court proceedings, the Plaintiffs filed the Notice of Motion dated 20/9/2022 which is subject to this ruling. The Plaintiffs sought to have the 1<sup>st</sup> and 2<sup>nd</sup> Defendants be ordered to purge contempt of court orders or be committed to civil jail.
5. The Plaintiffs stated that despite the Defendants being served with the orders issued on 3/3/2022, they went ahead and sold out the subject goods in utter disregard of the said orders.
6. The Respondent did not file a response to the application. Mention and hearing notices were issued upon the Defendants but they never made any appearance in court. On 25/5/2023, directions were given that the said application be disposed of by way of written submissions. Both parties complied by filing of respective and rival submissions.

### **Analysis and Determination**

7. I have considered the application, submissions together with the authorities relied upon by the parties as well as the law and in my view, the following issues are for determination;
  - a. Whether the failure to file a Replying Affidavit by the Defendants has consequences
  - b. Whether the Notice of Motion dated 20/9/2022 has merits.
  - c. Who bears the costs?
8. On the first issue, the Defendants were served with the application but failed to file their Response. They however filed their Statement of Defence dated 18/11/2022. Further, they filed their written submissions on the Plaintiffs application dated 20/9/2022.
9. The Defendants submissions are dated 15/8/2023 submitting that there was no contract between the Plaintiffs and the Defendants as the contract expired before filing of the suit. They further submitted that the items in question had already been sold prior to filing of the suit.
10. The Defendants were adducing evidence through the submissions. The courts have held that submissions cannot take place of evidence in legal proceedings. In the case of Daniel Toroitich Arap Moi v Mwangi Stephen Muriithi & Another [2014] eKLR, the Court of Appeal held as follows;

“Submissions cannot take the place of evidence. The 1<sup>st</sup> respondent had failed to prove his claim by evidence. What appeared in submissions could not come to his aid. Such a course only militates against the law and we are unable to countenance it. Submissions are generally parties’ “marketing language”, each side endeavouring to convince the court that its case is the better one. Submissions, we reiterate, do not constitute evidence at all. Indeed, there are many cases decided without hearing submissions but based only on evidence presented.”
11. Similarly, Mwera J in Nancy Wambui Gatheru v Peter W Wanjere Ngugi Nairobi HCCC No. 36 of 1993 stated as follows;

“Indeed and strictly speaking submissions are not part of the evidence in a case. Submissions, to this court’s view, are a course by which counsel or able litigants focus the court’s attention on those points of the case that should be given the closest scrutiny in order to firmly establish a claim/charge or disprove it. Once the case is closed a court may well proceed to give its judgement. There are many cases especially where parties act in person where



submissions are not heard. Even some counsel may opt not to submit. So submissions are not necessarily the case.”

12. The contents of the Defendants written submissions no matter how valid cannot be taken as evidence for purposes of responding to the application in question. The Defendants are therefore deemed not to have challenged the evidence adduced by the Plaintiffs relating to the contempt of court proceedings.
13. On the second issue, the Notice of Motion was brought under Section 5 of the [Judicature Act](#) which provides as follows;
  - (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 that 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.
14. In the case of *Christine Wangari Gachege v Elizabeth Wanjiru Evans & 11 Others* [2014] eKLR, section 5 of the [Judicature Act](#) was recognized as the only statutory basis for contempt of court law in the Court of Appeal and the High Court.
15. I have perused through The Civil Procedure (Amendment No. 3) Rules 2020 of England and more specifically, Rule 81 on “Applications and Proceedings in Relation to Contempt of Court”. Rule 81.4 provides for the “Requirements of a contempt application”
  81. 4. (1) Unless and to the extent that the court directs otherwise, every contempt application must be supported by written evidence given by affidavit or affirmation.
    - (2) A contempt application must include statements of all the following, unless (in the case of (b) to (g)) wholly inapplicable—
      - (a) the nature of the alleged contempt (for example, breach of an order or undertaking or contempt in the face of the court);
      - (b) the date and terms of any order allegedly breached or disobeyed;
      - (c) confirmation that any such order was personally served, and the date it was served, unless the court or the parties dispensed with personal service;
      - (d) if the court dispensed with personal service, the terms and date of the court’s order dispensing with personal service;
      - (e) confirmation that any order allegedly breached or disobeyed included a penal notice;
      - (f) the date and terms of any undertaking allegedly breached;
      - (g) confirmation of the claimant’s belief that the person who gave any undertaking understood its terms and the consequences of failure to comply with it;
      - (h) a brief summary of the facts alleged to constitute the contempt, set out numerically in chronological order;
      - (i) that the defendant has the right to be legally represented in the contempt proceedings;



- (j) that the defendant is entitled to a reasonable opportunity to obtain legal representation and to apply for legal aid which may be available without any means test;
- (k) that the defendant may be entitled to the services of an interpreter;
- (l) that the defendant is entitled to a reasonable time to prepare for the hearing;
- (m) that the defendant is entitled but not obliged to give written and oral evidence in their defence;
- (n) that the defendant has the right to remain silent and to decline to answer any question the answer to which may incriminate the defendant;
- (o) that the court may proceed in the defendant's absence if they do not attend but (whether or not they attend) will only find the defendant in contempt if satisfied beyond reasonable doubt of the facts constituting contempt and that they do constitute contempt;
- (p) that if the court is satisfied that the defendant has committed a contempt, the court may punish the defendant by a fine, imprisonment, confiscation of assets or other punishment under the law;
- (q) that if the defendant admits the contempt and wishes to apologize to the court, that is likely to reduce the seriousness of any punishment by the court;
- (r) that the court's findings will be provided in writing as soon as practicable after the hearing; and
- (s) that the court will sit in public, unless and to the extent that the court orders otherwise, and that its findings will be made public.

16. The Defendants were served with the orders issued on 3/3/2022. They filed a Notice of Preliminary Objection dated 11/3/2022 challenging the jurisdiction of this court to hear this matter. On 22/3/2022, the said P.O was dismissed with costs. There is nothing to show that the Defendants complied with the said orders.

17. It has been held that the power to punish for contempt of court is for purposes of upholding the authority of the court. In the case of *Econet Wireless Kenya Limited v Minister for Information and Communication of Kenya Authority* [2005] eKLR it was held as follows: -

“It is essential for the maintenance of the rule of law and order that the authority and the dignity of our courts are upheld at all times. The Court will not condone deliberate disobedience of its orders and will not shy away from its responsibility to deal firmly with proved contemnors. It is the plain and unqualified obligation of every person against whom an order is made by court of competent jurisdiction, to obey it unless and until the 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 the order believes it to be irregular or void.”



18. Further, it must be established that the Defendants willfully and deliberately disobeyed the court orders. In *Oilfield Movers Ltd v Zahara Oil & Gas Limited* [2020] eKLR the court stated -

“It is important however that the court satisfies itself beyond any shadow of a doubt that the person alleged to be in contempt committed the act complained of with full knowledge or motive of the existence of the order of the court forbidding it. The threshold is quite high as it involves possible deprivation of a person’s liberty.....”

19. I find that the Defendants having been served with the court orders willfully and deliberately disobeyed the said orders. I further find that the Application by the Plaintiffs is in compliance with Rules 81.4 as stated herein above and therefore has merits. In order to uphold the authority of the court, I find the 1<sup>st</sup> and 2<sup>nd</sup> Defendant in contempt of court.

20. On the issue of costs, it is settled that the same follows the event. That is the import of section 27 of the *Civil Procedure Act*. The court reserves its discretion on whether to award costs to either party. This was well enunciated by the Supreme Court in the case of *Jasbir Singh Rai & 3 others v Tarlochan Singh Rai Estate of & 4 others* [2013] eKLR. In the present circumstances, the Defendants chose its path fully aware of the consequences and I thus see no reason why I should deny the Plaintiffs costs of the application.

21. Following the foregone discourse, the upshot is that the following orders do hereby issue: -

- a. The Notice of Motion dated 20/9/2022 is hereby allowed and the 1<sup>st</sup> and 2<sup>nd</sup> Defendants are cited for contempt of court.
- b. That the Respondent to appear in open court for purposes of mitigation on a date to be given after the delivery of this ruling.
- c. Costs to the Plaintiffs.

Orders accordingly.

**DATED, SIGNED AND DELIVERED AT MOMBASA THIS 7<sup>TH</sup> DAY OF FEBRUARY, 2024.**

.....

**F. WANGARI**

**JUDGE**

In the presence of;

Mkan Advocate for the Plaintiff

Maiga Advocate h/b for M/S Ngotho Advocate for the Defendant

Barile, Court Assistant

