Motala v Cabinet Secretary Ministry of Interior & Coordination of National Government & 2 others (Constitutional Petition E023 of 2023) [2024] KEHC 2341 (KLR) (7 March 2024) (Ruling)

Neutral citation: [2024] KEHC 2341 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MOMBASA

CONSTITUTIONAL PETITION E023 OF 2023

OA SEWE, J

MARCH 7, 2024

BETWEEN

IMRAN MOTALA ..... PETITIONER

AND

THE CABINET SECRETARY MINISTRY OF INTERIOR & COORDINATION OF NATIONAL GOVERNMENT ..... 1ST RESPONDENT

THE DIRECTOR OF IMMIGRATION SERVICES ..... 2ND RESPONDENT

THE ATTORNEY GENERAL ..... 3RD RESPONDENT

RULING

1. Before the Court for ruling is the Notice of Motion dated 24th May 2023. It was filed by the petitioner, Imran Motala, pursuant to Sections 1A, 1B, 3A & 63 of the *Civil Procedure Act*, Chapter 21 of the Laws of Kenya, and Order 40 Rule 3 of the Civil Procedure Rules, 2010 as well as the inherent powers of the Court, for orders that the respondents be found and held to be in contempt of court; and that appropriate penalty be issued including imposition of a fine and/or committal to civil jail for infringement of a court order. The petitioner also prayed that the costs of the application be awarded to him.

2. The application was premised on the grounds set out on the face thereof, which were adverted to in the petitioner's Supporting Affidavit annexed to the application. The petitioner averred that sometime in March 2021, he applied for a Class 'G' Work Permit for specific trade business or consultancy as an investor; and that since then he has been following up on his application to no avail. In the meantime, he has travelled in and out of Kenya severally on his Visitors Pass. As of the 24th May 2023 when he made his deposition, his Visitors Pass, which had been renewed from time to time, was still valid and was due to expire on 26th May 2023.

3. The petitioner further averred that, on 30th December 2022, he received a telephone call from the Immigration Department at Mombasa with the information that his application for Class 'G' Work Permit had been declined; and that a 'Stop Order' had been flagged against his name in the system. He was consequently apprehensive that his Visitors Pass, and by extension, his freedom of movement, would be curtailed. In addition, he feared an imminent risk of his removal from Kenya without lawful cause; yet his appeal to the Cabinet Secretary Ministry of Interior and Coordination of National Government, under Section 40(1) of the *Kenya Citizenship and Immigration Act*, was still pending.

4. At paragraph 9 of his Supporting Affidavit, the petitioner averred that no reasons had been given as to why his application had been declined. He therefore posited that this action not only contravened the principles of natural justice but also the provisions of Article 10 of the Constitution of Kenya, which require all state officers to observe the principles of good governance, integrity, transparency and accountability.

5. The petitioner further deposed that, while awaiting the outcome of his appeal to the Minister as aforementioned, police officers raided his family house in Mombasa on the 5th April 2023, ostensibly with a view of his arrest and deportation. He explained that his wife is a Kenyan by birth and that they have a young family with school-going children. He consequently moved the Court by filing this Petition, and thereupon obtained interim orders on the 5th April 2023 and 19th April 2023 which, in his view, were disobeyed by the respondents when he was placed on the Watch List.

6. According to the petitioner, the effect of being placed on the Watch List is that all his applications for extension of the Visitor's Visa, and to be endorsed as his wife's dependent, have not been processed and are likely to be impeded or rejected. He added that, in effect, his freedom of movement has been curtailed. He therefore moved the Court vide the instant application seeking that the respondents be cited for contempt of court; fully convinced that the respondents appear to be driven by collateral considerations as opposed to the rule or considerations of law. He added that he is willing to abide by and commit himself to appearing before the Court whenever so required should this be necessary; and therefore that there is no reason for the respondents to seek to apprehend and deport him when his entire family is in Kenya.

7. The application was resisted by the respondents on the basis of the Replying Affidavit sworn by Mr. Jimmy Nyikuli, a Principal Immigration Officer in the Investigations and Prosecution Section of the Department of Immigration. Mr. Nyikuli confirmed that, upon receipt of information that the petitioner was illegally engaging in business in the country, immigration officers with the assistance of the police went to his house in Nyali on 4th April 2023 with the intention of arresting him for violating Kenya Immigration laws; but that the petitioner got wind of his impending arrest and ran off and hid himself "somewhere around tsavo and chyulu hills area". He added that, upon being served with the Court Order dated 5th April 2023, the search for the petitioner was called off immediately. Mr. Nyikuli further asserted that no attempts have been made thereafter by the respondents to arrest the petitioner.

8. The respondents also reacted to the petitioner's averments in connection with his application for Class 'G' Work Permit which averments are, in my considered view, peripheral to the contempt application, seeing as they form the subject of the Petition itself. Thus, the respondents averred, in conclusion, that the petitioner has not provided a shred of evidence in support of his allegations of disobedience of the orders of the Court to warrant the issuance of the orders sought.

9. The petitioner sought to respond to the respondent's averments and, to that end, obtained leave to file a Supplementary Affidavit. He accordingly reiterated the fact of his placement on the Watch List and

annexed documents in proof thereof. He then veered off on a tangent to discuss matters around his Visa extension application and his pending appeal to the 1st respondent.

10. The application was canvassed by way of written submissions, pursuant to the directions given herein on 6th July 2023. Thus, the petitioner relied on his written submissions dated 25th July 2023 filed by Mr. Khagram, as instructed by M/s A.B. Patel & Patel Advocates. Emphasis was placed by counsel for the petitioner on the assertion that the petitioner was placed on the Watch List without any just cause. It was further submitted that the respondents' contemptuous actions are compounded by their failure to abide by the orders of the Court issued on 5th April 2023. Counsel relied on Ramesh Popatlal Shah & 2 Others v National Industrial Credit Bank Limited [2005] eKLR and Republic v Kenya School of Law & 2 Others, Ex Parte Juliet Wanjiru Njoroge & 5 Others [2015] eKLR in urging the Court to allow the application, with a view of holding the respondents accountable for their wrongful conduct.

11. On her part, counsel for the respondents, Ms. Lang'at, relied on the written submissions dated 25th July 2023. In her view, the only issue for consideration is whether the respondents have disobeyed the orders of the Court. Counsel made reference to Rule 39 of the High Court (Organization and Administration) (General) Rules, 2016 and the cases of Sheila Cassatt Issenberg & Another v Antony Machatha Kinyanjui [2021] eKLR and Kenya Human Rights Commission v Attorney General & Another [2018] eKLR as to what amounts to contempt of court. On the threshold for contempt, reliance was placed on Mutitika v Baharini Farm Limited [1985] KLR 229, 234 and Republic v Ahmad Abolfathi Mohammed & Another [2018] eKLR. Hence, counsel urged the Court to find that the petitioner failed to discharge the burden of proof to the requisite standard.

12. I have given careful consideration to the petitioner's application, the Supporting Affidavit and its annextures, as well as the averments set out in the respondent's Replying Affidavit. I have likewise given due consideration to the written submissions filed by learned counsel for the parties. Since there is another pending application herein, there is a sense in which the contempt application was conflated with the petitioner's prayer for conservatory orders. I therefore need to point out that it was pursuant to the application for conservatory orders that the order for cross-examination of Mr. Jimmy Nyikuli was made. It is to be recalled that the order was made on 22nd May 2023, well before the petitioner filed his application for contempt. I will consequently confine myself, as much as feasible, to the contempt application.

13. For a long time now, Kenyan courts have relied on English law to determine contempt matters. That remains the position, notwithstanding that our Legislature passed the *Contempt of Court Act*, 2016, because that Act was subsequently declared invalid on 9 November 2018 for lack of public participation in Kenya Human Rights Commission v Attorney General & Another [2018] eKLR. Thus, Section 5 of the *Judicature Act*, Chapter 8 of the Laws of Kenya 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."

14. Accordingly, in Republic v Kajiado County & 2 others Ex parte Kilimanjaro Safari Club Limited [2019] eKLR, Hon. Nyamweya, J. (as she then was) summarized the current contempt of court legal landscape thus:

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 vs. 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*...

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..."

15. I note that counsel for the respondents also made reference to **Rule 39** of the **High Court (Organization and Administration) (General) Rules,** which provides as follows in Sub-rules (2) and (4):

(2) The High Court has power to—

a. punish a person for contempt on the face of the court; and

b. uphold the dignity and authority of subordinate courts.

...

(4) in any other case, other than contempt on the face of the subordinate court, the Court shall, in the exercise of its supervisory powers and on application by any person to the Court, punish contempt of court."

16. It is plain then that Rule 39 aforementioned is, in the main, circumscribed to contempt on the face of the court and in respect of situations arising in the exercise of the Court's supervisory jurisdiction. Accordingly, the substantive provision remains Section 5 of the *Judicature Act*.

17. It is a cardinal principle that court orders must be strictly obeyed, unless and until set aside, varied or discharged. This principle was aptly stated by Romer LJ in Hadkinson v Hadkinson [1952] AllER 567 thus:

> 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.
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> 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)

18. Accordingly, contempt of court has been defined to mean conduct or action that defies or disrespects the authority of the Court. Hence, in Sheila Cassat Issenberg & Another v Antony Machatha Kinyanjui (supra) it was held:

> 57. As was again stated by the Supreme Court of India in Mahinderjit Singh Bitta v Union of India & Others 1 A NO. 10 of 2010 (13th October, 2011):
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> In exercise of its contempt jurisdiction, the courts are primarily concerned with enquiring whether the contemnor is guilty of intentional and willful violation of the order of the court, even to constitute a civil contempt. Every party is lis before the court and even otherwise, is expected to obey the orders of the court in its spirit and substance. Every person is required to respect and obey the orders of the court with due dignity for the institution. (Emphasis).

19. As to the elements that must be proved for an alleged contemnor to be held to be in contempt of court, the court in the Sheila Cassat Issenberg & Another v Anthony Machatha Kinyanjui (supra), after reviewing applicable precedents, continued thus:

> 58. The emphasis as shown in the above cases is that there must be "willful and deliberate disobedience of court orders." There cannot be deliberate and willful disobedience, unless the contemnor had knowledge of the existence of that order. And because contempt is of a criminal nature, it is always important that breach of the order be proved to the required standard; first, that the contemnor was aware of the order having been served or having personal knowledge of it, and second; that he deliberately and willfully disobeyed it.
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> 59. In Peter K Yego & others v Pauline Wekesa Kode, (Acc No. 194 of 2014, the court stated that "it must be proved that one had actually disobeyed the court order before being cited to contempt."
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> 60. And in Katsuri Limited v Kapurchand Depor Shah [2016] eKLR, citing Kristen Carla Burchell v Barry Grant Burchell (Eastern Cape Division case No 364 of 2005), it was stated that "in order for an applicant to succeed in civil contempt proceedings, the applicant has to prove (i) the terms of the order, knowledge of the terms by the respondent, failure by the respondent to comply with the terms of the order."
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> 61. The Cromwell J, writing for the Supreme of Canada in Carey v Laiken, 2015 SCC 17 (16th April 2015), expounded on the three elements of civil contempt of court which must be established to the satisfaction of the court, thus:
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> i) The order alleged to have been breached "must state clearly and unequivocally what should and should not be done." This ensures that a party will not be found in contempt where an order is unclear. An order may be found to be unclear if, for example, it is missing an essential detail about where, when or to whom it applies; if it incorporates overly broad language; or if external circumstances have obscured its meaning.
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> ii) The party alleged to have breached the order must have had actual knowledge of it. It may be possible to infer knowledge in the circumstances, or an alleged contemnor may attract liability on the basis of the willful blindness doctrine.
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> iii) The party alleged to be in breach must have intentionally done the act that the order prohibits or intentionally failed to do the act that the order compels. (emphasis)..."

20. Similarly, in Samuel M. N. Mweru & Others v National Land Commission & 2 others [2020] eKLR it was held:

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: -
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> (a) the terms of the order (or injunction or undertaking) were clear and unambiguous and were binding on the defendant;
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> (b) the defendant had knowledge of or proper notice of the terms of the order;
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> (c) the defendant has acted in breach of the terms of the order; and
>
> (d) the defendant's conduct was deliberate..."

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

(a) the existence of a formal order of the court;

(b) That the order was clear and unambiguous;

(c) That the order was served on the alleged contemnor; and

(d) That the order was willfully and intentionally disobeyed.

22. Of course, in satisfying itself in terms of the foregoing parameters, the courts expect applicants to provide convincing evidence, because the standard of proof in such matters is the intermediate one of above a balance of probabilities but not beyond reasonable doubt. The Supreme Court furnished the rationale for this approach in Republic v Ahmad Abolfathi Mohammed & Another [2018] eKLR thus:

(29) The rationale for this standard is that if cited for contempt, and the prayer sought is for committal to jail, the liberty of the contemnor will be affected. As such, the standard of proof is higher than the standard in civil cases. This power, to commit a person to jail, must be exercised with utmost care, and exercised only as a last resort. It is of utmost importance, therefore, for the respondents to establish that the alleged contemnor's conduct was deliberate, in the sense that he or she willfully acted in a manner that flouted the Court Order."

23. Similarly, in Mutitika v Baharini Farm Limited (supra) it was held:

> " 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. We envisage no difficulty in courts determining the suggested standard of proof. 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 offence which can be said to be quasi – criminal in nature Winn LJ on page 1064 was in our view right in saying that the guilt has to be proved "with such strictness of proof ... as is consistent with the gravity of the charge ..."

24. With the foregoing in mind, I have perused the court record and confirmed that on the 5th April 2023, orders were made herein by the Duty Judge (Hon. Mutai, J.) in the following terms:

1. Thatthe Notice of Motion Application dated 5th April 2023 is hereby admitted for hearing during the Court's Easter Recess.
2. That the application dated 5th April 2023 is hereby certified urgent and heard ex part in the first instance.
3. Thata Conservatory Order is hereby issued against the 1st and 2nd Respondents restraining them whether by themselves, their agents, servants, employees or whosoever else from wrongfully and unlawfully interfering with the Petitioner's Visitors Pass Immigration Status or from restricting his movement in and out of Kenya or within Kenya pursuant thereto and/or removing him from Kenya pending the hearing of the said Application.
4. That the Notice of Motion Application dated 5th April 2023 to be served on the Respondents for hearing before the Presiding Judge on 19th April 2023.

25. The orders were initially made against the 1st and 2nd respondents, but were expanded on 19th April 2023 to encompass the Inspector General of Police, the Director of Criminal Investigations and the Director of Public Prosecutions. The orders were duly extracted for service; and therefore there can be no dispute that there were specific orders of the Court, which orders were unambiguous in terms. There is on record an Affidavit of Service sworn by Josephat Munika on 14th April 2023 which confirms that the formal Order was extracted and served on counsel for the respondents. In addition, the formal Order was thereafter served via email on the Immigration Department. There is therefore no dispute as to service of the orders.

26. It is instructive that in Shimmers Plaza Limited v National Bank of Kenya Limited [2015] eKLR the Court of Appeal pointed out that:

> " ...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:
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> "...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."

27. The Court of Appeal further held:

> "...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."

28. In the premises, I am in full agreement with the position taken by Hon. Tuiyott, J. (as he then was) in Oil Fields Ltd v Zahara Oil and Gas Limited [2020] eKLR that 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 -vs- 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."

29. As to whether there was willful disobedience of the orders, it is important to note that the petitioner's specific cause for complaint was that, in spite of the orders issued on the 5th April 2023, the 1st and 2nd respondents have, in flagrant breach of the said orders, placed him on the Watch List and thus his applications for extension of his Visitor's Pass and to be endorsed as his wife's dependent have not been processed. It is noteworthy however that in support of this assertion, the petitioner relied on a copy of the Declaration issued under Section 33(1) of the *Kenya Citizenship and Immigration Act* by the 1st respondent. The said Declaration is dated 4th April 2023. It is therefore plain that the petitioner's assertion as to disobedience is incongruent with the order of 5th April 2023 in so far as the evidence presented by petitioner proves that the act complained of occurred on 4th April 2023 before the order was made.

30. Moreover, the conservatory order was explicit and plainly stated thus:

> That a Conservatory Order is hereby issued against the 1st and 2nd Respondents restraining them whether by themselves, their agents, servants, employees or whosoever else from wrongfully and unlawfully interfering with the Petitioner's Visitors Pass Immigration Status or from restricting his movement in and out of Kenya or within Kenya pursuant thereto and/or removing him from Kenya pending the hearing of the said Application.

31. The respondents' assertion being that they have, since the 5th April 2023, endeavoured to comply with the court orders, the burden of proof was on the petitioner to satisfactorily demonstrate, beyond a preponderance of evidence, that there has been willful and intentional disobedience thereafter. All that the petitioner stated in this regard was that an attempt was made to arrest and deport him. That assertion is to be found at paragraph 14 of the Supporting Affidavit. Again, it is significant that the averment is in connection with an alleged occurrence of 5th April 2023, yet there is no indication or proof whether the attempt made was after service of the conservatory order. This is pertinent because, according to the respondents, the incident took place on the 4th May 2023 before the filing of the instant Petition and the interlocutory application for conservatory orders. Indeed, the Affidavit of Service filed herein by the Petitioner appears to show that the order was served on the Attorney General at 1753 hours on 5th April 2023, and on the 2nd respondent on 6th April 2023 at 1109 hours. In those circumstances, the respondents cannot be said to have willfully disobeyed the orders of 5th April 2023; not even in connection with their attempt to arrest the petitioner.

32. As to whether the petitioner's Visitor's Pass was wrongfully declined is a matter for another day; for it forms the subject of the Petition. It is therefore my considered finding that, roundly considered, the petitioner has failed to satisfactorily demonstrate willful disobedience of the order of 5th April 2023 to the applicable standard; which is the intermediate standard. His application fails and is hereby dismissed with an order that the costs thereof be in the cause.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 7TH DAY OF MARCH 2024

OLGA SEWE

JUDGE