



**Hato & 3 others v Gitonga & 6 others (Commercial Case 015 of 2020)
[2024] KEHC 4064 (KLR) (Commercial and Tax) (12 April 2024) (Ruling)**

Neutral citation: [2024] KEHC 4064 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL CASE 015 OF 2020
MN MWANGI, J
APRIL 12, 2024**

BETWEEN

**ANTHONY KIGAMBA HATO 1ST PLAINTIFF
DAVID KAMAU CHEGE 2ND PLAINTIFF
CECILIA WAMAITHA 3RD PLAINTIFF
LYDIA NJOKI MWANGI 4TH PLAINTIFF**

AND

**JULIA WAMBUI GITONGA 1ST DEFENDANT
LYDIA NYAWIRA NJERI 2ND DEFENDANT
SIMON GITIORA MUGO 3RD DEFENDANT
ROMAN GAITURU WANYOIKE 4TH DEFENDANT
PETER MACHARIA 5TH DEFENDANT
JOSEPH NDUNGU MAINA 6TH DEFENDANT
REGISTRAR OF COMPANIES 7TH DEFENDANT**

RULING

1. The 1st, 2nd, 3rd, 4th, 5th and 6th defendants through a Notice of Motion dated 30th March, 2023 anchored on the provisions of Sections 3, 3A and 63(c) of the *Civil Procedure Act*, Cap 21 Laws of Kenya, Order 40 rule 3 of the *Civil Procedure Rules*, 2010 and all enabling provisions of the law seek the following orders-



- i. That Anthony Kigamba Hato, Cecilia Wamaitha Njoroge & Lydia Njoki Mwangi, the 1st, 3rd and 4th plaintiffs/respondents in this matter, be committed to prison for such period of time as this Honourable Court may deem fit; and
 - ii. That costs of and/or occasioned by this Motion be paid by the aforementioned defendants/respondents.
2. The application is predicated on the grounds in support of it and the supporting affidavit of Julia Wambui Gitonga sworn on 16th March, 2023. She deposed that she had full knowledge and information concerning the matter and she is competent and duly authorized to swear this matter as a duly illegally elected director (sic) of Witeithie Gwaka Investment Co. Ltd. That she was aware that an order was made by Lady Justice A. Mshila on 21st October, 2021, where the Judge made an order for the maintenance of the assets as from 9.55a.m., on the said date and directed for the issues in the matter to be drawn while referring the case to the DR (Deputy Registrar) for case management.
3. Ms Gitonga averred that the order which bore a Notice of penal consequences was extracted by the aforementioned defendants/applicants' Advocate after being sealed and signed by the Court. She further averred that the plaintiffs/respondents and their Advocates were present when the order was pronounced and were served with that order by the then Advocate acting for the defendants, Mr. Wokabi Mathenge.
4. She deposed that the plaintiffs are acutely aware of that order, referring to it severally of being of no consequence, and after being requested by the defendants to maintain the status quo, they continue selling parcels of land and signing the sale agreements and certificates, in total and complete disregard and Court order given on 21st October, 2021 and issued on 26th October, 2021
5. Ms Gitonga further deposed that the plaintiffs have flagrantly disobeyed the entire order and have refused to comply with the same, while withholding, forging and irregularly using the company seal, Register, company document, shareholder certificates, Titles, unutilized certificates and office stamps contrary to that order, and as a consequence of the same, the authority and dignity of the Court has been, and continues to be exposed to ridicule and disrepute.
6. The deponent stated that the plaintiffs are in willful and blatant contempt of the Court order and it is in the interest of justice and for purposes of upholding the dignity and honour of the Court that the orders being sought herein ought to be granted, as the defendants have no other means of enforcing the order as the plaintiffs are hostile and threaten violence when intervention is sought.
7. The plaintiffs opposed the application vide a replying affidavit sworn by Anthony Kigamba Hato on 17th April, 2023 wherein he contended that Julia Wambui Gitonga is unfit and incompetent to swear (the supporting affidavit) as she is neither a member nor a qualified director of the company, and she has sworn to have been illegally elected as a director of the company. It was averred that Ms Julia Wambui Gitonga has come to Court with unclean hands and should not be heard for material non-disclosure.
8. Mr. Hato deposed that Ms Gitonga has come to Court with unclean hands and should not be heard for material non-disclosure. He attached a copy of a CR12 of 20th March, 2023 marked "A" showing inclusion of a Secretary who was not in the CR12 dated 28th November, 2019 marked "A" attached to her affidavit.
9. He averred that Clause 23 of their Articles of Association provides that a director should at least have two shares which the defendants' deponent's does not have. He stated that in clause 21, the directors should not be more than 6, yet their CR12 shows them to be 7, but the CR12 relied on by the



- applicants shows that the directors are 8. He urged this Court to expunge the affidavit by Ms Julia Wambui Gitonga from record.
10. Mr. Hato contended that no order has been attached as the attached order “B” is not an order.
 11. He stated that all the share certificates save for that of Simon King’ori Kabugu and Lucy Wanjira Kaninin were issued before the said order hence are inapplicable.
 12. He contended that they are in office and have always issued share certificates hence status quo means that they can still issue share certificates which are mere proof of membership.
 13. Mr. Hato stated that paragraphs 7 and 8 of the supporting affidavit are a blatant lie meant to hoodwink the Court to look at them unkindly. He prayed for the instant contempt of Court application to be dismissed with costs being awarded to them.
 14. In a further affidavit sworn by Ms Julia Wambui Gitonga on 18th April, 2023, she sought to clarify a number of issues raised in the replying affidavit.
 15. She asserted that she is a director of Witeithie Gwaka Investments Ltd, as evidenced in their attachment marked “A”, which is a copy of a CR12 of 20th March, 2023 wherein she is listed as a Director, hence competent to be joined in these proceedings. She pointed out that she has been sued in these proceedings as the 1st defendant and it is strange that the defendant (sic) would sue her and then turn around and claim that she is a stranger.
 16. Ms Gitonga averred that this application is for continued contempt of the orders by lady Justice A. Mshilla made on 21st October, 2021 on the maintenance of status quo, and that the 1st plaintiff in his replying affidavit has constructively, expressly, overtly and tacitly admitted wrong doing in the face of the order, and has portrayed and admitted defiant contempt by his own sworn disposition in paragraph 13.
 17. She stated that the 1st plaintiff has admitted that for whatever they are worth, the certificates of one Simon King’ori Kabugu and Lucy Wanjira Kanini were indeed illegally issued after receipt of the order of this Court.
 18. Ms Gitonga admitted that the defendants had inadvertently omitted to attach the 2nd page of the order, and attached a complete order to the further affidavit. She contended that the plaintiffs have not denied the existence of the order.
 19. She deposed that the plaintiffs continue holding Registers, certificates, seals and stamps, and with such illegal possession of the said instruments, they continue committing acts of contempt and it is in the interest of justice that they be compelled to surrender the said instruments to the office that the defendants hold as they have demonstrated that that they are law abiding directors who have, continue, and will maintain the status quo up to the conclusion of this matter or as the Court directs.
 20. Ms Gitonga contended that the replying affidavit by the 1st plaintiff is a stunning admission that the plaintiffs should be committed to prison up to the time they purge themselves of the contempt, if only to maintain the dignity and honour of the Court, which does not issue orders in vain. She prayed for the present application to be allowed with costs.
 21. The defendants filed their written submissions on 14th June, 2023. The plaintiffs did not file any submissions in regard to the application dated 30th March, 2023.
 22. Mr. P. M. Karanja, Learned Counsel for the 1st to 6th defendants stated that the plaintiffs have continued to defy the orders of Lady Justice Mshilla of 21st October, 2021, and that in their replying affidavit to



the application of 30th March, 2023, overtly, constructively, expressly and tacitly, they have admitted to wrongdoing in the face of that order and have portrayed defiance and confessed to being in contempt of valid Court orders.

23. Counsel submitted that in the face of the plain and clear admission and confession by the plaintiffs, the Court is left with no option but to find the plaintiffs to be in contempt of the orders of this Court on the maintenance of status quo.
24. He urged this Court to issue punitive orders against the contemptneours, not limited to a jail term of six months or a commensurate monetary fine in lieu or concurrently.
25. Mr. Karanja submitted that in view of the plaintiffs’ admissions of their continued retention of the registers, continuous selling of parcels of land, signing of certificates and sale agreements. Counsel urged this Court to order the plaintiffs to surrender for safe custody all the office instruments they continue to hold, with which they continue being in contempt to the lawful current office holders, the defendants, who have continued to maintain the status quo, and who aver to continue doing so.
26. He prayed for this Court to find the plaintiffs to be in active contempt of the orders of Lady Justice A. Mshillah of 21st October, 2021 and until they purge themselves of that contempt, the plaintiffs be found liable, as prayed in the application of 30th March, 2023.

Analysis and Determination

27. I have considered the application, the supporting, replying and further affidavits and the submissions filed by the defendants. The sole issue that arises for determination is if the plaintiffs are in contempt of the Court orders of 21st October, 2021.
28. In *Kenya Human Rights Commission v Attorney General & another* (Constitutional Petition No. 87 of 2017) [2018] eKLR the Court declared the *Contempt of Court Act* No. 46 of 2016 unconstitutional. As such, the prevailing law on contempt in Kenya is the applicable English law on contempt at the time of the commission of the contempt. This is pursuant to Section 5 of the *Judicature Act* which reads 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.”

29. At the time the alleged contempt was committed in this matter, the procedural law applicable was Part 81.4 of the *English Civil Procedure Rules (Amendment No. 3) Rules*, 2020, which stipulates as follows-

“81. 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.....”

30. The Court of Appeal has on numerous occasions reiterated the importance of an applicant meeting the above requirements on a standard that is above a balance of probabilities and almost beyond reasonable doubt, that is, an intermediate standard. The reason being that punishment for contempt of Court orders involves deprivation of one's liberty. In *Ochino & another v Okombo & 4 others* (Civil Appeal No 36 of 1989) [1989] eKLR, the Court of Appeal observed stated that:

“The power to deal with contempt of court is provided for under section 5 of the *Judicature Act* (cap 8) and order 39 rule 2(3) of the *Civil Procedure Rules*. We have to follow the procedure and practice in England. As we read the law, the effect of the English provisions is that as a general rule, no order of court requiring a person to do or abstain from doing any act may be enforced (by committing him for contempt) unless a copy of the order has been served personally on the person required to do or abstain from doing the act in question. The copy of the order served must be indorsed with a notice informing the person on whom the copy is served that if he disobeys the order, he is liable to the process of execution to compel him to obey it. As this court pointed out recently in the case of *Mwangi Mangondu v Nairobi City Commission* (Civil Appeal No 95 of 1988):

“This requirement is important because the court will only punish as a contempt a breach of injunction if satisfied that the terms of the injunction are clear and unambiguous, that the defendant has proper notice of the terms and that breach of the injunction has been proved beyond reasonable doubt.”

31. In *Samuel M. N. Mweru & Others v National Land Commission & 2 others* (Miscellaneous Civil Application No. 443 of 2017) [2020] eKLR Mativo J., (as he then was) underscored the following guiding factors in a case of contempt-

“38. The test for when disobedience of a civil order constitutes contempt has come to be stated as whether the breach was committed ‘deliberately and mala fide. A deliberate disregard is not enough, since the non-complier may genuinely, albeit mistakenly, believe he/she is entitled to act in the way claimed to constitute the contempt. In such a case good faith avoids the infraction. Even a refusal to comply that is objectively unreasonable may be bona fide (though unreasonableness could evidence lack of good faith).

39. These requirements – that is the refusal to obey should be both wilful and mala fides, and that unreasonable non-compliance, provided it is bona fide, does not constitute contempt – accord with the broader definition of the crime, of which non-compliance with civil orders is a manifestation. They show that the offence is committed not by mere disregard of a court order, but by the deliberate and intentional violation of the court's dignity, repute or



authority that this evinces. Honest belief that non-compliance is justified or proper is incompatible with that intent. The Constitutional Court of South Africa, underlined the importance to the Rule of Law, of compliance with court orders in the following terms-

“Compliance with court orders is an issue of fundamental concern for a society that seeks to base itself on the rule of law. The Constitution states that the rule of law and supremacy of the Constitution are foundational values of our society. It vests the judicial authority of the state in the courts and requires other organs of state to assist and protect the courts. It gives everyone the right to have legal disputes resolved in the courts or other independent and impartial tribunals. Failure to enforce court orders effectively has the potential to undermine confidence in recourse to law as an instrument to resolve civil disputes and may thus impact negatively on the rule of law.”

40. 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." (emphasis added).



32. The Supreme Court of India’s decision in *Indian Airports Employees Union v Ranjan Catterjee & another* [AIR 1999 SC 880: 1999(2) SCC:537, was cited with approval in *Sheila Cassatt Isenberg & another v Antony Machatha Kinyanjui* [2021] eKLR as follows-

“that in order to amount to “civil contempt” disobedience must be willful. If disobedience is based on the interpretation of court’s order, notification and other relevant documents, it does not amount to willful disobedience.”

33. In this instance, the contempt of Court application has not been brought under Section 5 of the *Judicature Act*. The plaintiffs have anchored their application on the provisions of Sections 3, 3A, 63(c) of the *Civil Procedure Act*, Cap 21 laws of Kenya, Order 40 Rule 3 and all enabling provisions of the law. Having failed to invoke Section 5 of the *Judicature Act* in their application, this Court cannot on frolics of its own formulate the defendants’ case of contempt of Court for them. In short, the defendants failed to get it right from the start and even failed to attach a complete copy of the order, as only portions of the order were attached to the supporting and further affidavits of Ms Julia Wambui Gitonga. The Penal Notice is not even visible on the said portions of the order.
34. Even though the plaintiffs are alleged to have admitted to having issued share certificates after the Court order of 21st October, 2021 was made, it is only fair that the defendants should get their application right from the get go, as required under Part 81.4 of the *English Civil Procedure Rules (Amendment No. 3) Rules*, 2020, and file their application in the right format by way of Application Notice.
35. The finding of this Court is that the application dated 30th March, 2023 is defective. It is hereby struck out with costs to the plaintiffs/respondents.

It is so ordered.

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 12TH DAY OF APRIL, 2024.
RULING DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.**

NJOKI MWANGI

JUDGE

In the presence of:

Mr. P.M. Karanja for the 1st to 6th defendants/applicants

No appearance for the plaintiffs/respondents

No appearance for the 7th defendant/respondent

Ms B. Wokabi – Court Assistant.

