



**Geonet Communications Ltd v Communications Authority of Kenya;
Safricom PLC & another (Interested Parties) (Petition E368 of 2022)
[2024] KEHC 6972 (KLR) (Constitutional and Human Rights) (13 June 2024) (Ruling)**

Neutral citation: [2024] KEHC 6972 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CONSTITUTIONAL AND HUMAN RIGHTS
PETITION E368 OF 2022
LN MUGAMBI, J
JUNE 13, 2024**

BETWEEN

GEONET COMMUNICATIONS LTD PETITIONER

AND

COMMUNICATIONS AUTHORITY OF KENYA RESPONDENT

AND

SAFRICOM PLC INTERESTED PARTY

TELKOM KENYA LIMITED INTERESTED PARTY

RULING

Introduction

1. By a Notice of Motion application for contempt of court dated 15th June 2023 supported by an affidavit in support of even date and a further affidavit dated 23rd June 2023, the petitioner seeks orders that:
 - a. Spent.
 - b. Pending the hearing and determination of this application an order be issued preventing the respondent from taking any regulatory action as contemplated in its letters dated 24th March 2023 (Ref: CA/FA/048/4662) and 26th April 2023 (Ref: CA/LS/FA/041/2021(341)) or any other regulatory action by way of reprisal.
 - c. Summons be issued against the Director General of the respondent, Mr. Ezra Chiloba to appear before this court and show cause why he should not be committed to civil jail for such term as



the Court may deem just or to be fined for not complying with this Court's judgment dated 5th April 2023.

- d. The Director General of the respondent corporation be cited for contempt of court and be committed to civil jail until he purges his contempt and complies with the orders of this court issued on 5th April 2023.
- e. In the alternative to prayer No.3 and No.4 above, this court do issue any such appropriate orders for the purposes of enforcing its judgment dated 5th April 2023.
- f. Costs of the application be provided for.

Background of Case

2. The petitioner a telecommunications company brought the subject petition against the respondent for its failure to compel the interested parties to reinstate their interconnection with the petitioner as its telecommunication services are dependent on this connection. Essentially the respondent's action was argued to have been in violation of the right to a fair administrative action as envisaged under Article 47 of *the Constitution* among other rights.
3. The Court in its judgment dated 5th April 2023 found partly in favour of the petitioner and ordered as follows:
 - a. A declaration hereby issues that the Communications of Kenya breached Articles 10, 232, 46 and 47 of *the Constitution*.
 - b. An order is hereby issued that within 60 days of this judgment, the Communications Authority of Kenya respond to the concerns raised by Geonet in this petition and further make an impartial decision that will promote fair competition.
 - c. As the petition has partly succeeded, each party bears its own costs.

The Petitioner's Case

4. Hassan Katetei Mdachi in the supporting affidavit averred that following this Court's pronouncement on 5th April 2023, the petitioner on 6th April 2023 made an interconnection request to the interested parties in compliance with Regulation 13(2) of Kenya Information and Communications (Interconnection and Provisions of Fixed Links, Access and Facilities) Regulations, 2010. This request was however declined by the 1st interested party in its letter dated 18th April 2023. On the other hand, the 2nd interested party did not make any response to the request.
5. The petitioner thereafter, forwarded the 1st interested party's response to the respondent's Director General for action. It is stated that the petitioner's letter went unanswered by the respondent. The respondent instead in a letter dated 25th May 2023 sought information from the petitioner concerning its subscribers. According to the respondent in its further letter dated 2nd June 2023, the sought information was deemed to be vital to assist the respondent comply with the said court orders. In compliance the petitioner issued this information on 3rd June 2023.
6. The gravamen of this application is that the respondent through its Director General despite the clear and unambiguous court orders which he had knowledge and proper notice of, went on to breach the terms of the order. He asserted that the petitioner stands to lose investments worth over Ksh.150,000,000 for the roll out of new technologies in Kenya. It is said that this investment was made in view of this Court's judgment in trust that the respondent would comply. The petitioner is further



stated to be losing the tune of Ksh.2,000,000 per day due to the respondent's failure to comply with the court orders which is averred to be deliberate.

7. The petitioner was additionally aggrieved because despite the respondent's failure to address its concerns, it still went ahead to seek compliance with its letters dated 24th March 2023 and 26th April 2023. The content being a demand of the unpaid license fees yet well aware that due to its inaction the petitioner had failed to make profits and also loss of revenue.

The Respondent's Case

8. In response, the respondent through its Director General, Ezra Chiloba filed a replying affidavit sworn on 23rd June 2023 where he deposed that while the Court Order (b) in the judgment dated 5th April 2023 sought to address the issues of connectivity with the interested parties, the same did not direct the respondent to compel the interested parties to interconnect with the petitioner.
9. Furthermore, referring to the sought outstanding license fees from the petitioner, it was asserted that the said court orders did not restrain the respondent from carrying out its regulatory mandate as dictated by the *Kenya Information and Communications Act* and neither was this issue subject of the stated judgment.
10. He deposed that in compliance with the court judgment the respondent, set up an internal review mechanism also composed of an ad hoc panel of experts to interrogate the issues raised in the petition. For this reason, the respondent wrote to the petitioner on 25th May 2023 seeking a list of its subscribers which was vital to the respondent's decision in the matter. Moreover, the respondent wrote to the interested parties on 18th May 2023 inquiring about the action they had taken to address the petitioner's issue.
11. It is asserted that the respondent's letter dated 2nd June 2023, informed the applicant that the subscriber list was lacking material information which was necessary to make its decision. It was stressed that this decision could not be made until this information was issued. Additionally, the petitioner was updated on the feedback it had received from the interested parties and Airtel Kenya on its request. It is noted that the petitioner issued the additional subscriber data on 3rd June 2023.
12. Considering the stated account, he asserted that the respondent upon receiving the cited Court judgment, it took the required actions to comply accordingly. As such he stated that contrary to the petitioner's contention, the respondent's failure to meet the 60-day timeline issued by the Court which lapsed on 4th June 2023 was not willful nor deliberate and that it was also occasioned by the petitioner's delay in issuing the required information. For these reasons, the application was deemed to lack merit.

Petitioner's Submissions

13. Gakahu and Rosana Advocates for the petitioner filed written submissions dated 26th June 2023 and supplementary submissions and a list of authorities dated 11th July 2023.
14. Counsel relying on Section 5(1) of the *Judicature Act* and the case of Samuel M.N. Mweru and others vs National Land Commission and 2 others (2020) eKLR submitted that for a claim of contempt of court to succeed the applicant must establish the terms of the order, knowledge of the terms by the respondent, failure by the respondent to comply with the orders and the presence of willfulness and bad faith on the part of the respondent. Comparable reliance was placed in *Econet Wireless Kenya Ltd vs Minister for Information and Communication of Kenya* and another (2005) 1 KLR 828.



15. Accordingly, Counsel citing paragraph 34 of the subject judgment submitted that the Court had instructed that the interested parties were under legal obligation to accept the request for access to its telecommunications as long as the request was reasonable. It is stated that the petitioner made this request to the 1st interested party on 6th April 2023 but was however declined for the reason that the Court had not ordered the 1st interested party to enter into a communication agreement with the petitioner.
16. It is stated that the respondent who was informed of the 1st interested party's refusal failed to address the issue. This was stated to be deliberate on the part of the respondent's Director General as no reasons were supplied for this failure. As a consequence, it was stressed that the Director General's conduct satisfied the elements of contempt of Court.
17. Counsel in light of this submitted that the petitioner was entitled to the reliefs sought in accordance with Part 81 of the English Civil Procedure Rules of 1998. Reliance was placed in *Katsuri LTD vs Kapurchand Depar Shah (2016) eKLR* where it was held that:

“It was the plain and unqualified obligation of every person against or in respect of whom an order was made by a court of competent jurisdiction to obey it unless and until it was discharged and disobedience of such an order would as a general rule result in the person disobeying it being in contempt and punishable by committal or attachment.”

Respondent's Submissions

18. S.M. Kilonzo and Associates Advocates on behalf of the respondent filed written submissions and a list of authorities dated 10th July 2023. Counsel sought to submit on the issue whether the petitioner had proved the elements of contempt of court and so whether entitled to the reliefs sought.
19. On the first issue, Counsel also relying on the case of Samuel M.N. Mweru (*supra*) submitted that the respondent is allowed to rebut an allegation of willful disobedience and bad faith of the court orders. It was argued therefore that based on the principles set out herein the court cannot adjudge the respondent guilty in the absence of proof.
20. It was asserted that the respondent contrary to the petitioner's allegation although had not complied with the court order had not done so deliberately or in bad faith. This is because owing to the stated averments in the respondent's affidavit, it was clear that the respondent had demonstrated its efforts toward complying with the subject court orders further noting that the petitioner had also failed to supply the relevant information in a timely manner.
21. Counsel further stated that the respondent in making its final decision was entitled to take into consideration all relevant facts related to the petitioner's circumstance. In support counsel cited the decision in HCCOMMA No. E023 of 2023: *Geonet Communications Ltd vs Safaricom PLC* and 2 others where the Court found that the petitioner had engaged in SIM Boxing. Consequently, Counsel argued that the petitioner had not proved beyond reasonable doubt that the respondent's failure to comply was deliberate and in bad faith hence the Director General was not guilty of contempt.
22. To this end, Counsel submitted that the petitioner was not entitled to the reliefs sought. With regard to Prayer No. 5, Counsel urged the court to take notice of the respondent's efforts to comply with its judgment dated 5th April 2023.



Analysis and Determination

Whether the respondent through its Director General is in contempt of the Court Orders dated 5th April 2023

23. The petitioner's key contention is that the respondent is in contempt of court for disobeying the orders issued by this Court in the judgment 5th April 2023 specifically Order (b) which directed thus:
- b) An order is hereby issued that within 60 days of this judgment, the Communications Authority of Kenya respond to the concerns raised by Geonet in this petition and further make an impartial decision that will promote fair competition.
24. The applicable law for contempt of Court proceedings in Kenya was deliberated in the case of Alfred Mutua v Boniface Mwangi (2022) eKLR as follows:
- “ 13. Before the enactment of the nullified *Contempt of Court Act* which deleted section 5 of the *Judicature Act* Cap 8 Laws of Kenya, the first port of call with respect to the procedure for institution contempt of Court proceedings in this country was and therefore is section 5 of the *Judicature Act* Cap 8 Laws of Kenya. That section provides:
- 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.
- 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. Therefore, the law that governs contempt of court proceedings is the English law applicable in England at the time the contempt was committed. The procedure in the High Court of Justice in England was considered in detail by the Court of Appeal in Christine Wangari Gachege vs. Elizabeth Wanjiru Evans & 11 Others [2014] eKLR. In that case the Court recognised that the only statutory basis for contempt of court law in so far as the Court of Appeal and the High Court are concerned is section 5 of the *Judicature Act*.
15. Under Rule 81.4 of the English Civil Procedure Rules (Amendment No. 3) Rules, 2020 provides for the requirements of a contempt application and provides that:
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 apologise 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.”



25. The Court in Republic vs Kenya School of Law & 2 others Ex parte Juliet Wanjiru Njoroge & 5 others (2015) eKLR underscored the purpose of contempt of court orders as follows:

“23. In my considered view, Court orders are not made in vain and are meant to be complied with. If for any reason a party has difficulty in complying with court orders the honourable thing to do is to come back to court and explain the difficulties faced by the need to comply with the order. Once a Court order is made in a suit the same is valid unless set aside on review or on appeal. In Econet Wireless Kenya Ltd vs. Minister for Information & Communication of Kenya & Another [2005] 1 KLR 828 Ibrahim, J (as he then was) stated:

“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, 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 void”.

26. On this premise, a party who seeks to have the court issue the contempt of court orders must meet the threshold set out by the in Samuel M. N. Mweru & Others (supra) as cited with approval in HMI v KBH (2021)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. 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.

..... Two principals emerge. The first is liberty:- it is basic to our Constitution that a person should not be deprived of liberty, albeit only to constrain compliance with a court order,



if reasonable doubt exists about the essentials. In this regard, I am not satisfied that willful disregard of the court order has been established.

The second reason is coherence. It is practically difficult, and may be impossible, to disentangle the reasons why orders for committal for contempt are sought and why they are granted. In the end, whatever the applicant's motive, the court commits a contempt respondent to jail for Rule of Law reasons; and this high public purpose should be pursued only in the absence of reasonable doubt. Accordingly, it is impermissible to find an alleged contemnor guilty of contempt in the absence of conclusive proof of the essential elements. The requisite elements must be established beyond reasonable doubt. In such a prosecution the alleged contemnor is plainly an 'accused person.

Third, accidental or unintentional disobedience is not sufficient to justify one for holding guilty of contempt. It is further relevant to bear in mind the settled law on the law of contempt that casual or accidental or unintentional acts of disobedience under the circumstances which negate any suggestion of contumacy, would amount to a contempt in theory only and does not render the contemnor liable to punishment.

It should be noted that developing the common law thus does not require the prosecution to lead evidence as to the accused's state of mind or motive: once the three requisites mentioned earlier have been proved, in the absence of evidence raising a reasonable doubt as to whether the accused acted willfully and mala fide, all the requisites of the offence will have been established.

And as O'Regan J pointed out, the power to imprison for coercive and non-punitive purposes is 'an extraordinary one':-

'The power to order summary imprisonment of a person in order to coerce that person to comply with a legal obligation is far reaching.

There can be no doubt that indefinite detention for coercive purposes may involve a significant inroad upon personal liberty. Clearly it will constitute a breach of S12 of *the Constitution* unless both the coercive purposes are valid and the procedures followed are fair. In this case there seems no doubt that the purpose is a legitimate one. It also seems necessary and proper, however, for the exercise of the power to be accompanied by a high standard of procedural fairness.'

Contempt of court is not merely a mechanism for the enforcement of court orders. The jurisdiction of the superior courts to commit recalcitrant litigants for contempt of court when they fail or refuse to obey court orders has at its heart the very effectiveness and legitimacy of the judicial system. That, in turn, means that the court called upon to commit such a litigant for his or her contempt is not only dealing with the individual interest of the frustrated successful litigant but also, as importantly, acting as guardian of the public interest."

13. From the above citation it is clear there are four elements to be proved beyond reasonable doubt in contempt of court proceedings;



- (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. Guided by the above legal principles, it is apparent that for contempt of court unlike other civil actions; the standard of proof is higher than a balance of probabilities. This is what the Court held in *Gatharia K. Mutikika – vs Baharini Farm Ltd* [1985] KLR 227 cited with approval in *OGM (Suing as the father of KGW) v FG & another* [2020] eKLR, where the Court stated:

“ A contempt of court is an offence of a criminal character. A man may be sent to prison. It must be proved satisfactorily..... it must be higher than proof on a balance of probabilities, almost but not exactly, beyond reasonable doubt...”

28. A key ingredient in a contempt of court application is that the applicant must prove willful and deliberate disobedience of a court order by the respondent once the first three elements have been demonstrated.
29. From the facts of this case, it is clear beyond peradventure that the respondent was fully aware of the Court orders made on 5th April 2023. The Respondent does not even dispute that fact in its affidavit. It does not deny that it did not comply with the orders of the Court within 60 days, that is at 4th June 2023.
30. The respondent however refutes the petitioner’s assertion that its lack of compliance was willful and deliberate. It pleads it had taken active steps to comply with the court orders but experienced some limitations for which it sought some information from the applicant to assist it in making an informed decision.
31. The petitioner disputed the respondent’s assertion and argued failure was intentional insisting that was no viable reason for the failure to comply by 4th June, 2023.
32. I have carefully considered the arguments made by both the applicant and the Respondent. The order which is the subject matter of this Application read: ‘An order is hereby issued that within 60 days of this judgment, Communications Authority of Kenya respond to the concerns raised by Geonet in this Petition and further make impartial decision that will promote fair competition’
33. In ‘responding to the concerns and making an impartial decision’ that in my view was a process that involved listening to and rendering that impartial decision. According to the Respondent, it embarked on gathering information it considered necessary to enable it make the decision as it was obligated in the judgment but when it required the Applicant to furnish it with certain information, the Applicant at first refused, stating that it was not necessary, only for the applicant to have a change of heart turn in the information in on 3/6/2023, a day to last day when the Respondent was expected to have complied. It was also on a Saturday, when the Respondent was not even open. A fact that the Applicant did not dispute.
34. In view of the above, this Court is not persuaded the respondent intentionally failed to comply with the court order. It is axiomatic that it could not make the decision without information and the Applicant was one of the sources of that information, the applicant delayed in giving it that information and as



result, time ran out. Indeed, it is also evident from the correspondence that the respondent was also in communication with the interested parties and Airtel Kenya requiring them to submit information so that it could determine the petitioner's interconnection request.

35. The judgment did not take away the respondent's regulatory mandate and the Applicant was under obligation to cooperate with the Respondent by providing the information to facilitate resolution of the applicant's concerns, the failure to do so contributed to the lapse of time.
36. It is my humble finding therefore that while terms of the order were clear, the respondent was aware of same and was in fact in breach, but in circumstances of this case, and having regard to the respondent's conduct in the scheme of things, it is my considered view that it was not deliberate disobedience as alleged by the Applicant.
37. The upshot is that the contempt application is dismissed with costs to the Respondent.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 13TH DAY OF JUNE, 2024.

L N MUGAMBI

JUDGE

