



**Njoroge v Baron Capital Limited & another (Civil Suit E136 of 2023)  
[2024] KEHC 11038 (KLR) (Commercial and Tax) (19 September 2024) (Ruling)**

Neutral citation: [2024] KEHC 11038 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
CIVIL SUIT E136 OF 2023  
JWW MONG'ARE, J  
SEPTEMBER 19, 2024**

**BETWEEN**

**ELIJAH NJORE NJOROGE ..... PLAINTIFF**

**AND**

**BARON CAPITAL LIMITED ..... 1<sup>ST</sup> DEFENDANT**

**LAZARUS KINYUMU MATIVO T/A SPECTRUM AUCTIONEERS .... 2<sup>ND</sup>  
DEFENDANT**

**RULING**

1. Before the Court is the Plaintiff's application dated 16<sup>th</sup> December 2023, brought under Sections 1A, 1B, 3, 3A and 63 (e) of the Civil Procedure Act, Section 5(1) of the Judicature Act, Part 81.1, Rule 81.1 of the English Civil Procedure Rules (Amendment No. 3) Rules, 2020 and Part 81.1-7, seeking the following orders:-
  1. Spent
  2. That summons be issued against the 1<sup>st</sup> Respondent's Director, SAMUEL KINYANJUI NGOTHO, to appear before court and show cause why he should not be committed to civil jail for such term as the court may deem just.
  3. That the Respondent's Director, SAMUEL KINYANJUI NGOTHO, be cited for contempt of court and be committed to civil jail for a term of six (6) months or until he purges his contempt and complies with the Orders of this Honourable Court issued on 24<sup>th</sup> April 2023.
  4. The Officer Commanding Parliament Police Station (or any other such Officer or Authority as may be directed by the Court), does accord and assist the Plaintiff with all necessary personnel



and logistics to enable him take possession and custody of motor vehicle registration numbers KDK 100Y, TOYOTA LAND CRUISER & KDK 220Y, LEXUS.

5. That the 1<sup>st</sup> Respondent and its directors be cited for Contempt of Court and be fined a sum of money at least equivalent to the cost of hiring alternative transportation at Kshs. 55,000/= per day from the 24<sup>th</sup> April 2023 until satisfactory compliance with the order of the Court.
  6. That warrants of attachment and sale do forthwith issue against the Respondents' property for the recovery of the fine imposed against the Respondents and/ or their managers/ directors.
  7. That the court does make any such Order or Directive as it deems appropriate for purposes of safeguarding its dignity and the rule of law.
  8. THAT the costs of this application be met by the 1<sup>st</sup> **Respondents**.
2. The application is premised on the grounds on its face, the annexed affidavit sworn by Elijah Njore Njoroge and written submissions dated 13<sup>th</sup> April 2023.
  3. The grounds are:-
    1. That on 24<sup>th</sup> April 2023, this Honourable Court issued Orders which, among other directives, ordered the Defendants to forthwith release motor vehicles registration numbers KDK 100Y Toyota Land Cruiser & KDK 220Y, Lexus, to the Plaintiff/Applicant.
    2. That the Order was issued in the presence of the Counsel for both Defendants.
    3. That in addition, the Order has been served upon both Defendants and they have confirmed knowledge of both the Order and its clear requirement for the release of the illegally attached motor vehicles through their various affidavits on the record of the Court.
    4. That to date, the 1<sup>st</sup> Defendant/ Respondent has refused to comply with the Order of the Court and instead started academic arguments on what it perceives as unfairness and injustice.
    5. That the 1<sup>st</sup> Defendant/ Respondent is guilty of contempt of court and ought to be punished as by law provided.
    6. That this Hon. Court has the duty and onus to safeguard its dignity and authority for the proper administration of the law.
  4. In opposing the application, the 1<sup>st</sup> Defendant filed a Notice of Preliminary Objection dated 26<sup>th</sup> February 2024, on the grounds: -
    1. That the Prayers sought in the Plaintiff/ Applicant's Notice of Motion date 15<sup>th</sup> December 2023 are res judicata for the following reasons;
    2. That the Application seeking prayers to cite the 1<sup>st</sup> Respondent and/ or the Respondent's Company's Director one SAMUEL KINYANJUI NGOTHO for contempt of Court was heard and conclusively determined by this Honourable Court.
    3. That contempt of Court proceedings being in the nature of criminal proceedings require that proof of a case against a contemnor be on a higher probability than that of a balance of probability since the liberty of the subject is at stake, and therefore the Applicant must prove wilful and deliberate disobedience of the Court Order. The Applicant is obliged to prove that the Order was served personally and the person had personal knowledge of the Order, a fact that this Honourable Court in striking out a similar Application agreed with, has not been complied with by the Applicant hence the Application is res judicata.



5. The 2<sup>nd</sup> Defendant filed a Grounds of Opposition dated 27<sup>th</sup> February 2024, on the grounds that:-
  1. This affidavit offends the mandatory provisions of Order 9 of the Oaths and Statutory Declaration Rules Cap 5 of the laws of Kenya.
  2. By marking the exhibits as “contempt 1 to contempt 6-4” the exhibits defies Rule 9 of the Oaths and Statutory Declaration Rules.
  3. The affidavit in support is thus an abuse of the court process and should be expunged in limine together with the exhibits.
  4. The involvement of police to carry out court orders is an abdication of duty, a surrender to police authority and slide to vigilantism law.
  5. The affidavits offend the provisions of Order 20 Rule 6, is scandalous, oppressive and irrelevant.
  6. The application is otherwise res judicata.

### **Analysis and Determination**

6. I have considered carefully the Application, the Preliminary Objection, the Grounds of opposition and the rival submissions by the parties. To my mind two issues arise for determination, to wit; (1) whether the Application is res judicata and (2) whether the applicant has made out a case for contempt of the order of 24<sup>th</sup> April 2023.
7. On the first issue, section 7 of the Civil Procedure Act provides that:-

“No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a Court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such Court.”
8. The elements of res judicata were set out by the Court of Appeal in *The Independent Electoral and Boundaries Commission v Maina Kiai & 5 others*, Nairobi CA Civil Appeal No. 105 of 2017 ([2017] eKLR), as follows:-

“Thus, for the bar of res judicata to be effectively raised and upheld on account of a former suit, the following elements must be satisfied, as they are rendered not in disjunctive but conjunctive terms;

  - a) The suit or issue was directly and substantially in issue in the former suit.
  - b) That former suit was between the same parties or parties under whom they or any of them claim.
  - c) Those parties were litigating under the same title.
  - d) The issue was heard and finally determined in the former suit.
  - e) The court that formerly heard and determined the issue was competent to try the subsequent suit or the suit in which the issue is raised.”



9. As stated, the elements of res judicata must be conjunctively established. According to the 1<sup>st</sup> defendant, the previous application for contempt of Court was heard and conclusively determined by this Honourable Court.

10. In the Ruling of 31<sup>st</sup> July 2023, this Court in striking out the Plaintiff's previous application for contempt of court dated 17<sup>th</sup> May 2023, made the following observations: -

“6. In the premises therefore the court will not consider the application filed by the plaintiff for contempt of court until such a time that it is proved that the defendants, being seized with court orders have failed and/ or refused to comply with the said orders and is indeed in contempt of court.”

11. As can be seen, this Court did not make a conclusive finding on the previous application for contempt. Therefore, the plea of res judicata does not apply.

12. The next question is whether the Plaintiff has made out a case for contempt of the order of 24<sup>th</sup> April 2023. The Plaintiff submitted that the Order was issued in the presence of Counsel for both Defendants. He also submitted that the Order has been served upon the 1<sup>st</sup> Defendant and that all prerequisites for the grant of a contempt order have been met.

13. On its part, the 1<sup>st</sup> Defendant faulted the Plaintiff for seeking contempt orders against its director, arguing that it offends the doctrine of corporate personality as its director cannot be cited for contempt for the actions and omissions. It also argued that the director is not party to this suit. It went on to assert that the Plaintiff is yet to conduct proper service upon it, pointing to the fact that this Court previously struck out a similar application for want of service.

14. Following the declaration of the Court in *Kenya Human Rights Commission v Attorney General & Another* [2018]eKLR that the Contempt of Court Act No. 46 of 2016 was inconsistent with the Constitution, the law applicable for contempt proceedings reverted to Section 5 of the Judicature Act, which provides that:-

“(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.”

15. The law governing contempt of court at the time of the purported omission is 81.4 of the English Civil Procedure Rules (Amendment No. 3) Rules, 2020, which provides: -

“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;..”

16. In addition, the Court of Appeal has emphasized that the above requirements must be established on a standard that is above balance of probabilities and almost beyond reasonable doubt because punishment by contempt involves deprivation of one's liberty. See *Ochino & another v Okombo & 4 others* (Civil Appeal No 36 of 1989) [1989] eKLR.
17. Further, the Applicant must demonstrate that the Respondent was aware of terms of the order, the Respondent had knowledge of the order; that the Respondent failed to comply with the terms of the order and that the refusal to obey the Court order was both wilful and mala fides. See *Samuel M. N. Mweru & Others v National Land Commission & 2 others* (Miscellaneous Civil Application No. 443 of 2017) [2020] eKLR and *Katsuri Limited v Kapurchand Depor Shah* [2016] eKLR.
18. On the second issue, the two sub-issues emerge for determination; (1) whether the Director of the 1<sup>st</sup> Defendant will be personally liable for contempt committed by and in the company's name and (2) whether the order was properly served.
19. In the instant matter, the Plaintiff sought to cite the 1<sup>st</sup> Defendant's Director for contempt but did not apply to lift the corporate veil. The Court of Appeal in *Geoffrey Kathuri Kison & 10 others v East African Portland Cement Co. Ltd & 5 others* (Civil Application No. 114 of 2019) [2021] eKLR, observed as follows:-

“We also note that the 2<sup>nd</sup> to 6<sup>th</sup> respondents cited for contempt are directors and officers of a corporate entity not cited in the application, which begs the question whether in such case the directors of a company will be personally liable for contempt committed by and in the name of the company. In the persuasive authority of *Katsuri Limited v Kapurchand Depar Shah* [2016] eKLR, the High Court (Mativo, J.) in considering contempt by a director of a company observed and rightly so in our view that:

“The alleged contemnor is a director of the company. He is not a party to these proceedings in his personal capacity. The company is a legal entity. The proper procedure for the applicant was first to apply to lift the corporate veil then go for the directors in their personal capacities.”

It follows therefore that failure by the applicants cite the 1<sup>st</sup> respondent for contempt and to lift the corporate veil of the 1<sup>st</sup> respondent denied them the chance to cite the 2<sup>nd</sup> to 6<sup>th</sup> respondents for contempt as directors or accounting officers of the 1<sup>st</sup> respondent.”

20. Guided by the above case, I find that there is no lawful basis for the prayers seeking to cite the 1<sup>st</sup> Defendant's Director for contempt.
21. On service, the Plaintiff produced Whatsapp messages between him and the 1<sup>st</sup> Defendant's Director and emails sent by his Advocate to the 1<sup>st</sup> Defendant's Director. However, there was no evidence of personal service of the orders.



22. The position of the law is that personal service of an order with an endorsement of a penal notice is a mandatory requirement to make out a case for contempt. The Court of Appeal in *Ochino & another v Okombo & 4 others* [supra], stated as follows:-

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 endorsed 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.”

23. Hence, I am not satisfied that the Plaintiff has demonstrated the above prerequisites to the required standard.
24. In the upshot, I am not persuaded that the Plaintiff has made out a case for contempt of the order of 24<sup>th</sup> April 2023 against the director of the Defendant Company. Consequently, the application dated 16<sup>th</sup> December 2023 is dismissed. Each party will bear their own costs.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 19<sup>TH</sup> DAY OF SEPTEMBER, 2024.**

.....

**J.W.W. MONG'ARE**

**JUDGE**

In the Presence of:-

1. Mr. Mutuku for the Plaintiff/Applicant.
2. Mr. Ouko for Defendant/Respondent.
3. Amos - Court Assistant

