



**Mokua v Central Kenya Conference of the Seventh Day Adventist & another;
 Nairobi Cosmopolitan Conference Limited (Interested Party); Obonyo &
 14 others (Contemnor) (Petition E252 of 2021) [2023] KEHC 1589 (KLR)
 (Constitutional and Human Rights) (10 March 2023) (Ruling)**

Neutral citation: [2023] KEHC 1589 (KLR)

**REPUBLIC OF KENYA
 IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
 CONSTITUTIONAL AND HUMAN RIGHTS
 PETITION E252 OF 2021**

**AC MRIMA, J
 MARCH 10, 2023**

BETWEEN

WILSON BURSEN MOKUA PETITIONER

AND

**CENTRAL KENYA CONFERENCE OF THE SEVENTH DAY
 ADVENTIST 1ST RESPONDENT**

**EAST KENYA UNION CONFERENCE OF THE SEVENTH DAY
 ADVENTIST 2ND RESPONDENT**

AND

NAIROBI COSMOPOLITAN CONFERENCE LIMITED .. INTERESTED PARTY

AND

ROBERT OBONYO CONTEMNOR

FRED OMBABA CONTEMNOR

ZEBULON OTWERE CONTEMNOR

ZACHARY OGEGE CONTEMNOR

DOMINIC OMBUI CONTEMNOR

PATRICK ONDICHO CONTEMNOR

JOB OMARE CONTEMNOR

CALEB NYAMWARO CONTEMNOR

SAMSON ORINA CONTEMNOR



HERON MIRUKA	CONTEMNOR
GEOFFREY ANYANA	CONTEMNOR
STEVEN OGWERI	CONTEMNOR
LILIAN OMBOGA	CONTEMNOR
DOUGLAS MONDA	CONTEMNOR
IBRAHIM KUNA	CONTEMNOR

RULING

Introduction:

1. The instant ruling relates to the application by way of a Notice of Motion dated 5th October, 2021. The application was taken out by the Petitioner.
2. The application was brought under Article 22, 23 and 159(2)(d) of the *Constitution*, Rules 2, 5 and 23(1) of the *Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules*, 2013; Section 5 of the *Judicature Act*, Order 40 Rule 3. Order 51 Rule 1 of the *Civil Procedure Rules* and Sections 3A and 63(e) of the *Civil Procedure Act*, Chapter 21 of the Laws of Kenya and all enabling provisions of the law.
3. The application mainly sought an order that the 15 alleged contemnors in this matter be found guilty of contempt of the orders of the Court issued on 23rd September, 2021 and that they be accordingly punished by committal to civil jail.
4. The application was supported by two Affidavits sworn by the Petitioner herein. They are the Supporting Affidavit sworn on 5th October, 2021 and a Supplementary Affidavit sworn on 30th November, 2021 respectively. The Petitioner also filed written submissions.
5. The application was supported by the Interested Party and opposed by the alleged contemnors. The Interested Party filed an Affidavit sworn by Pastor George Simi on 22nd October 2021 together with written submissions.
6. The alleged contemnors opposed the application. Each of the alleged contemnors filed a Replying Affidavit to the application, all sworn on 9th November 2021. They also filed written submissions.

Analysis:

7. From my reading of the Court documents filed and consideration of the submissions of the parties, I have identified the following two main issues for determination: -
 - i. The competency of the application;
 - ii. Whether the application ought to be allowed;
8. I will deal with the issues in seriatim.



a) The competency of the application:

9. The alleged contemnors contended that the application was fatally defective since it was brought under Section 5 of the Judicature Act which provision was deleted by Section 38 of Contempt of Court Act No. 46 of 2016 and as such the application lacked any legal foundation.
10. Whereas the Petitioner and the Interested Party did not respond to the issue, since it is a pure legal one, this Court will nevertheless deal with it.
11. It is a fact that the Contempt of Court Act, No. 46 of 2016 which became operational on 13th January, 2017 established the procedure for dealing with contempt of Court applications in Kenya. However, the Contempt of Court Act was short-lived. It was declared unconstitutional on 9th November 2018 in Kenya Human Rights Commission vs. Attorney General & Another [2018] eKLR for lack of public participation as required by Articles 10 and 118(b) of the Constitution, and for encroaching on the independence of the Judiciary.
12. It is instructive to note that Section 38 of the nullified Contempt of Court Act had repealed Section 5 of the Judicature Act, Section 39 of the same Act repealed section 36 of The High Court (Organization and Administration) Act while Section 40 repealed Section 35 of The Court of Appeal (Organization and Administration) Act.
13. This Court dealt with the question as to whether on the declaration of unconstitutionality of the Contempt of Court Act, the sections of the law it had repealed still stood repealed. That was in Ruling No. 1 in the High Court of Kenya at Nairobi in Petition No. 520 of 2017 Jimi Wanjigi & Another vs. Inspector General of Police & Others (2021) eKLR.
14. Upon a careful consideration of this eminent legal issue alongside Section 20 of the Interpretations and General Provisions Act, this Court found that upon the declaration of the unconstitutionality of the Contempt of Court Act by the Court, the law governing contempt of Court in Kenya reverted to the position before the enactment of the Contempt of Court Act.
15. This Court still holds that position.
16. Resulting from the above, I find and hold that, the Petitioner's application was properly brought under Section 5 of the Judicature Act among the other provisions.
17. I will now deal with the next issue.

(b) Whether the application ought to be allowed:

18. The Petitioner and the Interested Party urged this Court to allow the application. They submitted that the Court's order in force has been disobeyed all along and that the Court ought to hold the contemnors to account for their disobedience.
19. In urging this Court to allow the application, the Petitioner and the Interested Party contended that the alleged contemnors have all along been aware of the Court order since the order was rendered in the presence of their respective Counsel.
20. Responding to the application, the alleged contemnors reiterated their averments in their respective Replying Affidavits. In essence, they contended that they were not the officials of the Respondents and that none of them was personally served with the order in issue.
21. This Court has carefully considered the application. Before the Court renders itself on the application, a brief look at the history of applications in the nature of contempt of Court will suffice.



22. As early as 1952, Courts have held that the duty to obey the law by all individuals and institutions is cardinal in the maintenance of the rule of law and due administration of justice. In *Hadkinson vs. Hadkinson* (1952) ALL ER 567, the Court stated as follows:-

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 it is discharged. The uncomprising 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. Lord Cottenham, L.C. said in *Chuck vs. Cremer* (1) (1 Coop. temp. Cott 342:

A party, 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 a question. That the course of a party knowing of an order, which was null or irregular, and who might be affected by it, was plain. He should apply to the court that it might be discharged. As long as it exists it must not be disobeyed.

23. Closer home, the Court of Appeal in *Refrigeration and Kitchen Utensils Ltd vs. Gulabchand Popartal Shah & Another*, Civil Application No. 39 of 1990 (unreported) stated that:

...it is essential for the maintenance of the rule of law and good order that the authority and dignity of our Courts is upheld at all times.

24. In *TSC vs. KNUT & 2 others* (2013) eKLR, the Court observed as follows:-

38. The reason why Courts will punish for contempt of court then is to safeguard the rule of law which is fundamental in the administration of justice. It has nothing to do with the integrity of the Judiciary or the Court or even the personal ego of the Presiding Judge. Neither is it about placating the applicant who moves the Court by taking out contempt proceedings. It is about preserving and safeguarding the rule of law.

25. There is a long line of decisions upholding the above position including *Shah & Another t/a Lento Agencies vs. National Industrial Credit Bank Ltd* (2005) 1 KLR 300, *Mulika vs. Babarini Farm Ltd.* (1985) KLR 227 among others.

26. The foregoing is the background of contempt applications. Returning to the matter at hand, this Court has already dealt with the competency of the application. As held, the obtaining procedure in contempt proceedings is hence the one provided for in Section 5 of the *Judicature Act*. (See the Court of Appeal in *Christine Wangari Gachege vs. Elizabeth Wanjiru Evans & 11 others* (Civil Application No. 233 of 2007 (unreported).

27. Section 5 of the *Judicature Act* 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 exercise of the original Criminal jurisdiction of the High Court.
28. Given the fact that the law in England has variously changed over time, a Court has to ascertain the applicable law in the High Court of Justice in England at the time the application for contempt was filed. In this case, the application was filed on 7th September, 2020.
29. This requirement was emphasised by the Court of Appeal in *The Matter of an application by Garbaresh Singh & Sons Ltd* – Misc. Civil Case No. 50 of 1983 where the Court expressed itself as follows:-
- The second aspect concerns the words of Section 5- “for the time being”, which appear to mean that this court should endeavour to ascertain the law in England at the time of the trial, or application being made.
30. Further the Court of Appeal in *Christine Wangari* case (*supra*) stated as follows: -
- Following the implementation of the famous Lord Woolf’s Access to Justice Report, 1996’, the Rules of the Supreme Court of England are gradually being replaced with the Civil Procedure Rule, 1999. Recently on 1st October, 2012 the Civil Procedure (Amendment No. 2) Rules, 2012 came into force and part 81 thereof effectively replaced Order 52 of the Rules of the Supreme Court of England in its entirety
31. Under the Order 52 of the Rules of the Supreme Court of England, an Applicant in contempt application was under a mandatory duty to give notice to the Government Officer of such contempt application prior to filing of the said application and to seek leave of the Court to institute contempt of court proceedings. However, in 2012 the law in England changed and it is no longer necessary to serve the notice upon the Government Officer or to seek the leave of the Court prior to filing of such an application.
32. In this case, the application for contempt was filed in October, 2021. Therefore, the Petitioner was not under any obligation to mandatorily serve a notice to the Government Officer (the equivalent being the Attorney General) and to seek the leave of the Court.
33. Contempt of Court proceedings are usually quasi-criminal proceedings in nature because the liberty of a party is usually at stake. The standard is therefore higher as so provided for in Section 5(2) of the *Judicature Act* where a conviction arising out of such proceedings is appealable as if it were a conviction entered into in the normal exercise of original criminal jurisdiction in the High Court. For this reason it is imperative that the law regulating the contempt proceedings must be properly and fully complied with otherwise it may result to miscarriage of justice on the part of the alleged contemnor.
34. One of the cardinal requirements in contempt proceedings is service. In this case, it is the service of the order of this Court that resulted from the Ruling No. 1 delivered on 23rd September, 2021.
35. The issue of service of the order is hotly contested by the alleged contemnors in this matter. They contended that they were never served with the order and that they only became aware of the same sometimes in November, 2021 when they saw a copy thereof pasted on the Church gate.
36. On its part, the Petitioner contended that the ruling was delivered in the presence of the Counsel for the Respondents who is the same Counsel representing the alleged contemnors hence the alleged contemnors must have been duly informed by their Counsel of the Court order.



37. It is a fact that the alleged contemnors were enjoined in these proceedings by an order of this Court made on the 26th October, 2021. Before then the parties were the Petitioner, the two Respondents and the Interested Party. There is no evidence that the alleged contemnors and any of them are officials or representatives of the Respondents. To me, it may be the case that the alleged contemnors are part of the congregation of the Church who are opposed to the Respondents and the Interested Party.
38. The parties have referred to several decisions on the position that knowledge of the existence of a Court order by a party amounts to sufficient service and such a party has the obligation to obey the order. This Court wholly agrees with the said position. However, in this case, the alleged contemnors were not parties to the case any time before they were enjoined by this Court on 26th October, 2021.
39. Whereas the Counsel for the Respondents was present when the order was made, the said Counsel was not representing the alleged contemnors as at that time. In such a case, it will be unfair and without any legal basis to find and expect that the Respondents' Counsel had a duty to inform the alleged contemnors of the order while they were not his clients by then.
40. The Petitioner has affirmed the position that he never served the order on the alleged contemnors. As this Court has found that the Counsel for the Respondents was not representing the alleged contemnors as at the time the order was made, hence the issue of knowledge of the order does not arise, it is this Court's further finding that the Petitioner overlooked a very crucial step in his bid to cite the alleged contemnors for disobeying a Court order. It, therefore, remains that the alleged contemnors were neither served with the Court order nor were they parties in the matter when the order was made.
41. With such a lacuna in the process, the application cannot succeed.
42. Having so found, this Court is still under a duty to ensure that the rule of law is upheld. Given that the alleged contemnors have deponed that they have since been carrying out their services in tents pitched around 200 metres from the main Church, they shall forthwith desist from doing so and in compliance with the orders of the Court vesting the administration of the Church (which includes undertaking and conducting church services) upon the Interested Party herein.

Disposition:

43. Coming to the end, this Court wishes to profusely apologize for the late delivery of this ruling. The delay was mainly occasioned by the number of election-related matters which were filed in the Constitutional and Human Rights Division from December 2021. From their nature and given that the country was heading to a General election, the said matters had priority over the rest. The Court was also transferred in July 2022, on need basis, to a new station which had serious demands that called for urgent attention. The totality of it all yielded to the delay herein. Galore apologies once again.
44. In the end, the following orders do hereby issue: -
 - a. The Notice of Motion dated 5th October, 2021 is hereby dismissed.
 - b. Robert Obonyo, Fred Ombaba, Zebulon Otwere, Zachary Ogege, Dominic Ombui, Patrick Ondicho, Job Omare, Caleb Nyamwaro, Samson Orina, Heron Miruka, Geoffrey Anyana, Steven Ogweri, Lilian Omboga, Douglas Monda, Ibrahim Kuna are hereby jointly and/or severally restrained from conducting and/or carrying on any services within the compound of Mountain View SDA Church in Nairobi unless with the permission of the Nairobi Cosmopolitan Conference Limited, the Interested Party herein.



- c. For clarity, pending the hearing and determination of the Petition herein, the administration of Mountain View SDA Church shall remain under the Nairobi Cosmopolitan Conference Limited, the Interested Party herein.

Orders accordingly.

DELIVERED, DATED AND SIGNED AT KITALE THIS 10TH DAY OF MARCH, 2023.

A. C. MRIMA

JUDGE

Ruling virtually delivered in the presence of:

Mr. Kubai, Counsel for the Petitioner.

Mr. Onyango, Counsel for the alleged contemnors.

Mr. Malenya, Counsel the Interested Party.

