



REPUBLIC OF KENYA



**Dewdrop Enterprises Limited v Abdullahi (Civil Appeal E285 of 2021)
[2023] KEHC 17353 (KLR) (Civ) (4 May 2023) (Ruling)**

Neutral citation: [2023] KEHC 17353 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**CIVIL
CIVIL APPEAL E285 OF 2021**

CW MEOLI, J

MAY 4, 2023

BETWEEN

DEWDROP ENTERPRISES LIMITED APPLICANT

AND

ABDIRIZAK ADAN ABDULLAHI RESPONDENT

RULING

1. The events leading up to the motion dated December 15, 2021 are as follows. Dewdrop Enterprises Limited (hereafter the Applicant) filed an application dated June 30, 2021 which proceeded ex parte on November 3, 2021 as the Respondent failed to file a response or attend despite service. The court allowed the motion by issuance of a temporary injunction restraining Abdirizak Adan Abdullahi (hereafter the Respondent) from committing and or continuing to breach the tenancy agreement between the parties herein dated June 22, 2018, pending hearing and determination of this appeal.
2. The Applicant has now moved the court vide the instant motion seeking inter alia that the Respondent be cited for disobedience of this court's order issued on November 3, 2021 and consequently be committed to jail for a period to be determined by this court; that the Respondent be compelled to facilitate the attachment/seizure of his motor vehicle registration number KCP 147Y by delivering the same to an auctioneer appointed by the Applicant; and that the Director General of the National Intelligence Service do withhold one third of the gross amount payable to the Respondent for the present and each subsequent month and forthwith remit the same to the Applicant until the Respondent ceases disobedience of the temporary injunction. The motion is expressed to be brought under order 22 rule 42 & order 40 rule 2 & 3 of the *Civil Procedure Rules* and section 1A, 1B, 2, 3A, 44(1)(viii) & 78(2) of the *Civil Procedure Act* among others.
3. The grounds on the face of the motion are amplified in the supporting affidavit sworn by Edward Thiong'o Wachira, who describes himself as the Managing Director of the Applicant duly authorized



to depose. Rehashing the history of the matter, he proceeds to assert that despite being served with the court's order on November 24, 2021, the Respondent has unlawfully and unreasonably disobeyed the said orders by failing to settle undisputed rent arrears, failing to comply with the terms of the tenancy agreement and failing to forward to the Applicant proof of payment of undisputed water charge arrears. That the Respondent is employed and the owner of motor vehicle KCP 147Y as such he is capable of abiding by the court orders.

4. The Respondent filed a replying affidavit dated January 10, 2022 in opposition to the motion. He takes issue with the averments in affidavit in support of the motion for being false allegations and denies owing rent arrears or breach of the tenancy agreement. He asserts that on several occasions he paid his rent through a friend which payment the Applicant has not disputed, having issued receipts for the sums received. He contends that the deponent of the affidavit in support has perjured himself and he ought to be prosecuted for giving false information under oath. He further contends that the motion is misconceived as the tenant-landlord relationship between the parties was terminated as from November 23, 2021. Hence the prayers sought are untenable.
5. In rejoinder by way of supplementary affidavit Edward Thiong'o Wachira reiterated the contents of the affidavit material in the Applicant's motion dated June 30, 2021 and deposed that the Respondent had on November 23, 2023 had unlawfully purported to terminate the tenancy agreement.
6. The motion was canvassed by way of written submissions. The Applicant calling to aid the supreme court decision in *Raila Amolo Odinga & Another v IEBC & 2 Others* [2017] eKLR as cited in *Daniel Orieno Migore v South Nyanza Co Ltd* [2018] eKLR. He contended that the Respondent's response to the instant motion ought to be disregarded to the extent that it purports to show that he was not in breach of the tenancy agreement. He reiterated that the Respondent was in breach of the tenancy agreement and thus in disobedience of the temporary injunctive orders granted by this court.
7. The Applicant cited the decision in *National Bank of Kenya Ltd v Pipeplastic Samkolit (K) Ltd & Another* [2001] eKLR to submit that there is uncontroverted evidence that the Respondent disobeyed this court's orders by breaching the tenancy agreement. In conclusion, he urged the court to allow the motion to promote the rule of law as well as the Applicant's right to fair administrative action and to property under the *Constitution*.
8. On his part, counsel for the Respondent contended that motion is misguided since the orders sought can only be issued where there exists a decree to be enforced and where there is clear-cut disregard of the order or judgment of the court. While citing the provisions of Section 38 of the *Civil Procedure Act*, Section 1A, 1B & 3A of the Civil Procedure Rules and the decision in *Braeburn Limited v Gachoka & Another* [2007] eKLR he contended that there was no contractual relationship between the parties capable of breach therefore the Respondent cannot be held to be in disobedience of court orders. The court was urged to dismiss the motion with costs.
9. The court has considered the rival affidavit material and submissions in respect of the motion as well as the record herein. The court is called upon to determine whether the Respondent in contempt of the orders of this court issued on November 3, 2021 and whether penalties ought to be imposed against him. Court orders are not made in vain; the party against whom they are directed must obey the order.
10. In *Kyoga Hauliers Limited v Long Distance Truck Drivers & Allied Workers Union* [2015] eKLR the Court of Appeal held as follows:-

“The power to deal with contempt of court is provided for under Section 5(1) of the *Judicature Act*, Section 63(c) of the *Civil Procedure Act* and Order 40 Rule 31 of the *Civil Procedure Rules*. Of importance in the determination of this issue is however Section 5(1)



of the *Judicature Act*, since Section 63(c) of the *Civil Procedure Act* and Order 40 Rule 31 of the *Civil Procedure Rules* are concerned with disobedience of an order of temporary injunction and resultant consequences which are punishment in the form of imprisonment or attachment and sale of the contemnor's property."

See also *Christine Wangari Gachege v Elizabeth Wanjiru Evans & 11 others* [2014] eKLR

11. *Black's Law Dictionary* (Ninth Edition), defines contempt of court as

"conduct that defies the authority or dignity of a court."

The *Court of Appeal in Christine Wangari Gachege v Elizabeth Wanjiru Evans & 11 Others* [2014] eKLR held that in punishing contempt the court exercises ordinary criminal jurisdiction. In *Stewart Robertson v Her Majesty's Advocate*, 2007 HCAC 63 it was stated that:

"Contempt of court is constituted by conduct that denotes willful defiance of or disrespect towards the court or that willfully challenges or affronts the authority of the court or the supremacy of the law, whether in civil or criminal proceedings."

12. The Supreme Court of Kenya in *Republic v Ahmad Abolfathi Mohammed & Another* (2018) eKLR explained the reason why courts punish contempt as follows :-

"(24) In *Econet Wireless Kenya Ltd v. Minister for Information & Communication of Kenya & Another* [2005] 1 KLR 828 Ibrahim J (as he then was) relied on the Court of Appeal decision in *Gulabchand Popatlal Shah & Another* Civil Application No 39 of 1990 (unreported), where the Court of Appeal stated as follows:

"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... In *Hadkinson v Hadkinson* (1952) 2 All ER 567, it was held that:

"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) The Court of Appeal in *AB & Another v RB*, Civil Application No 4 of 2016 [2016] eKLR cited with approval the Constitutional Court of South Africa's decision in *Burchell v. Burchell*, Case No 364 of 2005 where it was held:

"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 court and requires other organs of the state to assist and protect the court. 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 have 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....”

(28) It is, therefore, evident that not only do contemnors demean the integrity and authority of Courts, but they also deride the rule of law. This must not be allowed to happen....”

13. The Supreme Court proceeded to explain the rationale for the high standard of proof of contempt as follows:

“[28] ...We are also conscious of the standard of proof in contempt matters. The standard of proof in cases of contempt of Court is well established. In the case of *Mutitika v. Babarini Farm Limited* [1985] KLR 229, 234 the Court of Appeal held that:

“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...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 an offence which can be said to be quasi-criminal in nature.”

[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.

[30] The question that begs an answer, thus, is: did the applicant willfully disobey this Court’s Orders?”

14. The two related ingredients of willful disobedience and knowledge of the order are critical in a successful contempt proceeding. In the past, it was held by superior courts that for an applicant to succeed in contempt proceedings, he must prove personal service of the subject orders and the attendant penal notice upon the alleged contemnor. See the Court of Appeal decision in in *Nyamogo & Another v Kenya Posts and Telecommunications Corporation* [1994] KLR 141.

15. In recent years however, superior courts have stated that where the applicant is able to demonstrate awareness by such alleged contemnor of the orders and not necessarily personal service of the order upon the contemnor, such awareness is sufficient. See *Kenya Tea Growers Association v Francis*



Atwoli & Others [2012] eKLR. Notably, the courts emphasize the high degree of proof required, and reiterating the exhortations in *Mutikika v Baharini Farm Limited* [1985] KLR 227, that:-

“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. The standard of proof beyond reasonable doubt ought to be left where it belongs, to wit criminal cases. It is not safe to extend it to offences which can be said to be quasi-criminal in nature.

However, the guilt has to be proved with such strictness of proof as is consistent with the gravity of the charge... Recourse ought not to be had to process of contempt of court in aid of a civil remedy where there is any other method of doing justice. The jurisdiction of committing for contempt being practically arbitrary and unlimited, should be most jealously and carefully watched and exercised with the greatest reluctance and the greatest anxiety on the part of the judge to see whether there is no other mode which is not open to the objection of arbitrariness and which can be brought to bear upon the subject... applying the test that the standard of proof should be consistent with the gravity of the alleged contempt... it is competent for the court where contempt is alleged to or has been committed, and or an application to commit made, to take the lenient course of granting an injunction instead of making an order for committal or sequestration, whether the offender is a party to the proceedings or not.”

16. In this case there is no dispute that an order was issued on November 3, 2021 against the Respondent and both he and his counsel on record were duly served with the orders in question. The purport of the order is not in dispute. However, concerning the disobedience of the foregoing order, the Respondent’s answer as I understand it is that firstly, he owed no arrears in rent to the Applicant, and secondly, he terminated the tenancy agreement on November 23, 2021 and vacated the Applicant’s premises.
17. The Applicant failed to disclose in his affidavit supporting the motion that the Respondent had served upon the Applicant the notice to terminate the tenancy as of November 23, 2021, a day before the Respondent was served with the order of this court. It was only after the Respondent deposed to these matters in his replying affidavit that the Applicant filed a supplementary affidavit in which he stated that the Respondent had purported to serve notice of termination of the tenancy on November 23, 2023. The Applicant has not controverted the Respondent’s assertions that pursuant to the said notice he had vacated the suit premises.
18. Whether the said notice was adequate under the terms of the tenancy agreement or not, the key question arising is whether in the absence of a subsisting tenancy relationship the court could grant the orders sought by the Applicant. The answer is clear; the application (and possibly the appeal itself) has been overtaken by events. Courts do not act in vain. And the court finds that in failing to disclose in the supporting affidavit the fact of the termination notice served by the Respondent prior to service of the orders sought to be enforced, and prior to the filing of the instant motion in January 2022, the Applicant was guilty of material non-disclosure.
19. The second but equally pertinent point arising is that from its material, the Applicant has canvassed matters that pertain not only to the merits of the appeal, but also the suit before the subordinate court. As held in *Ahmad Abolfathi Mohammed’s case* (*supra*) the standard of proof in contempt applications is high because of the attendant penalties. In this case, the liberty and property of the alleged contemnor are at stake. What the Applicant seeks by his present motion is a determination that the Respondent is in breach of several clauses in the lease agreement particularly regarding payment of rent and rent



arrears, which the Respondent vehemently disputes, and ought to be punished for the contempt by imprisonment and attachment of his assets.

20. Given the nature of the dispute, the court is wary of deciding at an interlocutory stage that the Respondent is guilty of breaching the terms of the tenancy agreement as highlighted by the Applicant especially regarding payment of rents, and consequently the orders of this court. That would be premature and likely to prejudice the eventual trial of the appeal and the suit in the lower court.
21. In the result, the motion dated December 15, 2021 must fail and is hereby dismissed. However, parties will bear their own costs.

DELIVERED AND SIGNED ELECTRONICALLY AT NAIROBI ON THIS 4TH DAY OF MAY 2023.

C. MEOLI

JUDGE

In the presence of:

The Applicant: in person

For the Respondents: Mr. Kimanzi

C/A: Carol

