



**Gibb Africa Limited v Engineers Board of Kenya (Judicial Review 1145 of 2020)
[2023] KEHC 20320 (KLR) (Judicial Review) (14 July 2023) (Judgment)**

Neutral citation: [2023] KEHC 20320 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
JUDICIAL REVIEW
JUDICIAL REVIEW 1145 OF 2020**

JM CHIGITI, J

JULY 14, 2023

BETWEEN

GIBB AFRICA LIMITED APPLICANT

AND

ENGINEERS BOARD OF KENYA RESPONDENT

JUDGMENT

1. The Applicant by a Notice of Motion Application dated 21st April, 2022 - under sections 1A, 1B & 3A of the *Civil Procedure Act*; Section 5(1) of the *Judicature Act* Cap 8; and Order 51 Rule 1 of the *Civil Procedure Rules* – sought for:
 1. An order of committal to be made against Eng. Erastus K. Mwangera, Chairperson of the board of the respondent, and Eng. Margaret Ogai, Chief Executive officer of the respondent to prison for such period as this honourable court may deem fit and just, in that they, the said Engineer Erastus K. Mwangera And Engineer Margaret Ogai, have disobeyed the Orders made herein by this Honourable Court on the 24th day of March 2022 compelling and directing the Respondent herein to comply with the provisions of the *Engineers Act*, 2011 and the Engineers Rules, 2019 and register the Applicant as an Engineering Consulting Firm.
 2. An order that Costs of and occasioned by this Motion be paid by the said Eng. Erastus K. Mwangera And Eng. Margaret Ogai.
2. The Application was based on grounds on the face of it, and supported by the grounds set out in an Affidavit evenly dated, and sworn by Paul Karekezi, Chairperson of the Applicant. The Applicant averred that by a judgment delivered on 24th March, 2022 in its favour to wit, orders of Certiorari, and Mandamus were issued being directed at the Respondent commanding the Respondent to comply



- with the provisions of the [Engineers Act](#), 2011 and the [Engineers Rules](#), 2019 and to register the Applicant as an Engineering Consulting Firm.
3. The Applicant contended that through their Advocate, *vide* a letter dated 5th April, 2022; and subsequently, by a letter dated 12th April, 2021 which were addressed to The Chairperson of the Board of the Respondent, The Chief Executive Officer of the Respondent demanded the Respondent to comply with the Court's final orders of 24th March, 2022 – which orders were clear, unambiguous, and binding.
 4. Further, that the Respondent has knowledge of the proper notice of the terms of the order; and that the Respondent's conduct of failing to comply with the orders is deliberate, intentional, and a flagrant disregard, and disobedience of this Honorable court; Noting that there is no stay against the judgement and the orders.
 5. Additionally, in a Further/Supplementary Affidavit dated 6th December, 2022 the Applicant stated that the Respondent *vide* a letter dated 5th December, 2022 invited the Applicant to a meeting scheduled for 14th December, 2020 to deliberate on the Applicant's application to be registered as an Engineering Consulting Firm.
 6. The Applicant maintains that the Respondents action amounts to open defiance of the Courts orders of 24th March, 2022 - which the Applicant claims directed the Respondent to register the Applicant as an Engineering Consulting Firm. To the Applicant, there is nothing to deliberate upon with the Respondent, as they ought to comply with the said orders outright without any deliberations whatsoever.
 7. Moreover, by a Further/Supplementary Affidavit dated 9th February, 2023 that the court held that the Applicant had met the prescription of the law, thus what remained was for the Respondent to issue the Applicant with an Engineering Consulting Certificate. That the Respondents in their claim that the court issued an order of *mandamus* against the provisions of Section 20(1) of the [Engineers Act](#) 2011 and Rule 5 (2) of the [Engineers Rules](#) 2019 is a clear dissatisfaction with the order of the court.
 8. In response to, and opposing the Application, the Respondent filed their Replying Affidavit dated 14th April, 2022 sworn by Eng. Margaret N. Ogai. The Respondent averred that in an effort to comply with the court's judgment delivered on 24th March, 2022 and the Court of Appeal Ruling issued on 21st October, 2022 the Committee on Registration, Professional Development and Compliance held a meeting on 24th October 2022 and deliberated on this matter with a view to comply with the Court Orders issued.
 9. Further, that the Board held a meeting on 9th November, 2022 and resolved to process the Applicant's application for registration in line with the court's judgment of 24th March, 2022 and as provided for by the [Engineer's Act](#) Cap 530 Laws of Kenya.
 10. That pursuant to the stated meetings, the Board invited the Applicant for a meeting on 14th December, 2022 to deliberate on its application in order to facilitate registration as directed by this Honourable Court. That, to the dismay of the Respondent, on 6th December, 2022 the Board received a letter from the Applicant's advocates indicating that the Applicant would not attend the meeting.
 11. The Respondent maintained that they (Board) is ready and willing to comply with the Court Order issued by this Honourable Court, but that the Applicant is not facilitating compliance as registration is a process. The Respondent (Board) stated that they have not refused and/or declined to comply with the Court Orders, but that the Applicant is making compliance difficult by not attending a scheduled meeting to facilitate registration. To which, the Respondent seeks the co-operation of the Applicant



in complying with the Court' Orders. The Respondent posited that the Application is misconceived, frivolous, and abuse of the court process, that lacks merit and ought to be dismissed with costs.

12. In further opposition to the Application, the Respondent through the Attorney General, filed their Grounds of Oppositions dated 31st May, 2022 on the basis:
 1. That the application as drawn and taken out as against the respondent is incurably defective incompetent and is otherwise an abuse of court process.
 2. That the application is premature as the Respondent has since appealed the Judgment and there is a pending Application for Stay at the Court of Appeal being Nairobi Civil Appeal Number E131 of 2022 awaiting the empanelment of a bench since parties have filed their respective submissions.
 3. That it is only fair and just that this Application be stayed and await the outcome of the Court of Appeal.
13. Additionally, opposing the Application, the Respondent filed their Supplementary Affidavit dated 6th February, 2023 deponed by Eng. Margaret N. Ongai, the Registrar/CEO of the Respondent. The Respondent stated that the court issued an order of mandamus requiring the Respondent to register the Applicant as an Engineering Consulting Firm against the provisions of Section 20(1) of the Engineers Act 2011 and Rule 5(2)(c) of the Engineers Rules, 2019.
14. The Respondent averred that on counsel advice the Registration of the Applicant was to be undertaken in compliance with the provisions of the Engineers Act 2011 and Engineers Rules 2019. That guided by the said law, the Respondent commenced the process of Registering the Applicant by placing the Application before the Committee on Registration, Professional Development and Compliance - which Board Committee is established under the Provisions of Section 8 of the Act.
15. That, the Applicant was invited to appear before the said committee, but he declined. The Respondent deponed that under the law, specifically section 21(3) of the Engineers Act, the Committee has the powers to require an Applicant to appear before it for clarifications and better particulars, if it deems fit.
16. It was the Respondent's position was that the Honourable Court did not exempt the Applicant from the clear provisions of the law, but indeed made it clear that the Registration was to be made in accordance with the Act.
17. That the Respondent has already resolved to comply with the orders of this Honourable court and process the Applicant's registration; However, that the Board is eager to register the Applicant in compliance with the orders of this Court, but the Applicant has made compliance difficult for non-cooperation.
18. The Respondent urged this Honourable Court to dismiss this Application and direct the Applicant to appear before the Board as requested to enable them(Respondent) complete the process of registration in accordance with the Law.
19. On one hand, to advance their case, the Applicant filed written submissions dated 16th February, 2023 wherein the Applicant submitted with cited authorities: That the terms of the order are clear and unambiguous and are binding on the Respondent; That the Respondent has knowledge of or proper notice of the terms of the order; That the Respondent has acted in breach of the order; and That the Respondent conduct is deliberate. To which the Applicant maintained that the Respondent was in contempt of this courts orders.



20. On the other hand, in promoting its case, the Respondent, in their written submissions dated 24th February, 2023 posited with cited authorities that they (Respondent) did not wilfully, refuse to register the Applicant as an Engineering Consulting firm. Also, that the Applicant failed to prove that the Respondent wilfully failed, refused, and/or neglected to obey the court order. In particular, that the Applicant failed to prove that the Eng. Erastus K. Mwongera, Chairperson of The Board of the Respondent, and Eng. Margaret Ogai, Chief Executive Officer of the Respondent wilfully and deliberately disobeyed the court order that was issued.
21. After a careful consideration of the materials before this court, I find the issue for determination as: Whether the Respondent is guilty of disobeying the orders of the court emanating from the judgment made by Justice A.K Ndung'u on 24th March, 2022 thus rendering them in contempt of court.
22. The obligation of every person to obey court orders was summed up in the case of *Hadkinson v Hadkinson* (1952) 2 ALL ER56 as follows;
- “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 and in an application to the court by him not being entertained until he had purged his contempt. ”
23. The rule of law would be in great danger if the courts failed to ensure compliance with court orders. Without enforcement through punishing for contempt of court, the orders of court would remain mere rhetoric not worth the paper they are written on. To my mind, a judge should enforce his orders through punitive measures to those who disobey the orders.
24. I resonate with the finding of the court in *Republic v County Chief Officer, Finance & Economic Planning, Nairobi City County Ex Parte Stanley Muturi* where it was held as follows;
- “Court orders are not meant for cosmetic purposes. They are serious decisions that are meant to be and ought to be complied with strictly. As was held in *Teacher's Service Commission v Kenya National Union of Teachers & 2 Others* Petition No. 23 of 2013:
- “The reason why courts will punish for contempt of court 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 of court proceedings. It is about preserving and safeguarding the rule of law. A party who walks through the justice door with a court order in his hands must be assured that the order will be obeyed by those to whom it is directed. A court order is not a mere suggestion or an opinion or a point of view. It is a directive that is issued after much thought and with circumspection. It must therefore be complied with and it is in the interest of every person that this remains the case. To see it any other way is to open the door to chaos and anarchy and this Court will not be the one to open that door. If one is dissatisfied with an order of the court, the avenues for challenging it are also set out in the law.
- Defiance is not an option.”



25. The ingredients to be proved in a contempt application are well settled. The court in *Felicity Mutete Mutula v Nairobi County Government* [2021] eKLR laid down the requirements thus;

“From the foregoing Rules, I would say that some of the salient features in an application for contempt of court are as follows:

1. Disobedience of a court order or judgment is a foundation for contempt of court proceedings against the contemnor.
2. Where the contemnor is a company or other corporation, the committal order may be made against any director or other officer of that company.
3. The judgment or order in question must be served on the person required to do or not to do the act in question unless the court expressly dispense with personal service.
4. Where the person required to do or not to do an act is a company or other corporation, a copy of the judgment or order must also be served on the alleged contemnor.
5. Judgments and orders must be served personally.
6. The court may, however, dispense with personal service if it is satisfied that the contemnor had notice of the judgment or order;
 - a. By being present when the judgment or order was given or made;
or
 - b. By being notified of its terms by telephone, email or otherwise.
7. The court may also dispense with personal service if it thinks it is just to do so or may make an order in respect of service by an alternative method or an alternative place.
8. There shall be permanently displayed on the front copy of the judgment or order served a warning to the person required to do or not to do the act in question that disobedience to the order would be contempt of court punishable by imprisonment, a fine or sequestration of assets. Without this display the judgment or order may not be enforced unless it is an undertaking contained in a judgment or order.
9. The contempt of court application shall be made by an application notice in the same proceedings in which the judgment or order was made.
10. The application notice must set out in full the grounds on which the committal application is made and must identify, separately and numerically, each alleged act of contempt including, if known, the date of each of the alleged acts; and must also be supported by one or more affidavits containing all the evidence relied upon.
11. The application notice and the evidence in support must be served personally on the respondent although the court may dispense with service under



paragraph (10) if it considers it just to do so: or may make an order in respect of service by an alternative method or at an alternative place. "

26. These ingredients are summed up in the book *Contempt in Modern New Zealand* as follows;
- “ 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.”
27. Turning to the instant case before this court, the Applicant has demonstrated the existence of a by Justice A.K Ndung’u on 24th March, 2022 and indeed in compliance with that judgement, the Respondent invited the Applicant to participate in the process of registering the as an Engineering Consulting firm – in accordance with the *Engineers Act* and Rules.
28. It is clear, and the Applicant conceded that they (Applicant) did not attend before the Board (Respondent) for registration process. To my mind, and on careful examination of the Judgment, the Applicant was not exempted from the law being applied to the in registration purposes; and neither did the Court order the Respondent to register the Applicant, but it was ordered to inter alia comply with the provisions of the *Engineers Act*, 2011 and the *Engineers Rules*, 2019 and register the Applicant as an engineering consulting firm.
29. The Respondent commenced the process of Registering the Applicant by placing the Application before the Committee on Registration, Professional Development and Compliance. The Board Committee is established under the Provisions of Section 8 of the *Engineers Act*.
30. Notably, Section 21 (3) of the *Engineers Act* states that, "The Board may require the applicant to furnish such further information or evidence of eligibility for registration as it may consider necessary and may require the applicant to appear in person for an interview before the Board."
31. Flowing from the above, the Committee has the powers to require an applicant to appear before it for clarifications and better particulars, if it deems fit. Therefore, as the Applicant herein was requested to appear before the committee, via a letter, but elected not to appear before it (committee), the Applicant cannot turn and fault/blame the Respondent for their (Applicant) failure and uncooperativeness, which hindered/frustrated the Registration process.

Orders:

1. The Application dated 21st April, 2022 is unmerited, and the same is dismissed with cost.
2. The Orders of Justice A.K Ndung’u in the judgment rendered on 24th March, 2022 shall remain in force.



3. The Applicant herein to avail self before the Engineers Board of Kenya, within thirty (30) days from today's date, for processing of the Application for Registration within the framework of the orders of 24th March, 2022.
4. Parties to appear before this court on 20th September 2023 for purposes reporting on compliance.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 14TH DAY OF JULY, 2023.

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JOHN CHIGITI (SC)

JUDGE

