



**Republic v Nairobi Metropolitan Services (NMS) & 5 others; Metro Trans EA Ltd (Interested Party); Kaka Travellers Cooperative Savings and Credit Society Limited (Ex parte Applicant); Omurwa (Contemnor) (Judicial Review Application E131 of 2022) [2023] KEHC 20692 (KLR) (Judicial Review) (20 July 2023) (Ruling)**

Neutral citation: [2023] KEHC 20692 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
JUDICIAL REVIEW  
JUDICIAL REVIEW APPLICATION E131 OF 2022**

**JM CHIGITI, J  
JULY 20, 2023**

**BETWEEN**

**REPUBLIC ..... APPLICANT**

**AND**

**NAIROBI METROPOLITAN SERVICES (NMS) ..... 1<sup>ST</sup> RESPONDENT**

**THE DIRECTOR OF ROADS, PUBLIC WORKS & TRANSPORT,  
NMS ..... 2<sup>ND</sup> RESPONDENT**

**DIRECTOR OF ENFORCEMENT, NMS ..... 3<sup>RD</sup> RESPONDENT**

**THE INSPECTOR GENERAL OF POLICE ..... 4<sup>TH</sup> RESPONDENT**

**THE DTO CENTRAL POLICE STATION ..... 5<sup>TH</sup> RESPONDENT**

**THE HON. ATTORNEY GENERAL ..... 6<sup>TH</sup> RESPONDENT**

**AND**

**METRO TRANS E.A. LTD ..... INTERESTED PARTY**

**AND**

**KAKA TRAVELLERS COOPERATIVE SAVINGS AND CREDIT SOCIETY  
LIMITED ..... EX PARTE APPLICANT**

**AND**

**ROSANA OSCAR OMURWA ..... CONTEMNOR**



## RULING

1. The application before this Court is the Notice of Motion application dated 3<sup>rd</sup> March 2023 filed by the contemnor herein. The application seeks the following orders:
  1. That this application be certified urgent and heard *ex-parte* on the first instance.
  2. That in the interim and pending hearing and the determination of this Application *ex-parte*, this Honorable Court be and is hereby pleased to stay the execution of the orders issued on the 23<sup>rd</sup> February, 2023.
  3. That in the interim and pending hearing and the determination of this Application, this Honorable Court be and is hereby pleased to stay the execution of the orders issued on the 23<sup>rd</sup> February, 2023.
  4. That this Honorable Court be and is hereby pleased to review, vary or set aside the order issued on the 23<sup>rd</sup> February, 2023.
  5. That Cost be provided.
  6. That the Court do make such order or further orders as it may deem fair and just in the interest of justice.
2. The application is supported by the Supporting Affidavit of Rosana Oscar Omurwa, the Applicant herein and is sworn on 3<sup>rd</sup> March, 2023.
3. The Contemnor's case is that pursuant to the Court's (Ndung'u J) orders of 23<sup>rd</sup> February, 2023 he was found in contempt of court for disobedience of the court's orders issued on 21<sup>st</sup> November, 2022.
4. The Orders of 21<sup>st</sup> November are said to have directed as follows;

“That an interim Order of Prohibition be and is hereby issued prohibiting the Respondents and the Interested Party (Metro Trans E.A Ltd or any other party or entity acting at their behest and/or agency), from unlawfully blocking the *ex parte* Applicant's and its members' PSV vehicles operating as such PSVs along Githunguri-Nairobi CBD route, access to, from (and/at) the Applicant's designated Tom Mboya Street slated Passenger picking-up and drop off bay, or any other place within their Licensed Road Service Licensed (RSL) route pending further Orders of this Court.”
5. The Contemnor/ Applicant is said to have effective 1<sup>st</sup> January, 2023, resigned from being the CEO/ managing director of the Interested Party herein and the CR12 amended to reflect the updated list of directors.
6. It is urged that the Contemnor/ Applicant does not have any control whatsoever over the Interested Party and as such cannot facilitate the implementation of the orders issued on the 21<sup>st</sup> November, 2022. The Applicant urges that he is apprehensive that in the event he defaults he will be committed to jail and this will be highly prejudicial to him.
7. In response the *ex parte* Applicant filed a Replying Affidavit sworn by Duncan Muruga Maura who swears to be the Chairman of the *ex parte* Applicant on 21<sup>st</sup> April, 2023. In the Affidavit Mr. Muruga



contends that the Motion dated 3<sup>rd</sup> March, 2023 is in itself an act of Contempt of Court as it purports to interfere with the due administration of justice.

8. The motion it is urged seeks to rubber stamp and endorse an illegal change of Directors of the Interested Party when the matter is *lis pendens* in order for the Contemnor to evade culpability. Mr. Rosana Oscar Omurwa it is argued having failed to purge his stated Contempt of Court, is disentitled to any of the pleas for substitution of Directors made.
9. The Motion dated 3<sup>rd</sup> March, 2023 it is argued is grossly incompetent for effectively being an application for "Review" of the Order dated 23<sup>rd</sup> February, 2023 yet it fails to meet the set threshold for exercise of discretion in his favour under the said jurisdiction as no such Order is attached.
10. The *ex parte* Applicant also contends that the Motion is frivolous, vexatious, and amounts to a gross abuse of the Court process further that it lacks merit. The Contemnor/Applicant it is urged did not demonstrate that as at the time the Hon. A K Ndung'u held him in Contempt of court he was not a Director of the Interested Party, Metro Trans EA Ltd.
11. It is the *ex parte* Applicant's case that litigation must come to an end as per the judicial policy espoused under Article 159(2)(a) of *the Constitution* of Kenya; and that therefore to grant the pleas sought by the Applicant in the motion dated 3<sup>rd</sup> March, 2023 would be a defeat of this Constitutional mandate.
12. The *ex parte* Applicant contends that at the time when the contempt of court arose and when the application for contempt application dated 8<sup>th</sup> December, 2022 was filed and served upon Mr. Rosana Oscar Omurwa he was still a Director of the Interested Party and also familiar with the issues raised at the material time. The *ex parte* Applicant also contends that at the time he was in control and in charge of the operations of the Interested Party.
13. The *ex parte* Applicant urges that the Contemnor has failed to provide the name of the Director who he now alleges has replaced him in the said company and that the changes to the Directorship must have been made at the very least on 3<sup>rd</sup> January, 2023 when the Ruling for contempt was still pending.
14. The Contemnor it is urged is aware of the specific terms of the contempt order as has been rehashed in his Replying Affidavit in the contempt proceedings at Paragraph 5. The *ex parte* Applicant also contends that Mr. Rosana Oscar Omurwa was personally served and that he never protested that he was no longer a Director of the Interested Party at the time nor did he protest when the contempt of Court Proceedings dated 8<sup>th</sup> December, 2022 took off.
15. The *ex parte* Applicant further contends that the Contemnor/ Applicant seeks to substitute his culpability already declared against him, which would be shifting the blame to Directors who can easily claim innocence having ostensibly joined the Interested Party Company after the Contempt of Court proceedings had been personally served and concluded as against Mr. Oscar Murwa.
16. The Contemnor it is argued in his affidavit in support of his instant Motion dated 3<sup>rd</sup> March, 2023, did not deny that he holds the overall Managing Director capacity of the Interested Party or that he holds no responsibility in the affairs of the Interested Party.
17. It is contended that although the Contemnor claims that he has resigned from Metro Trans EA Ltd he has not provided any evidence of the said resignation or any resolution or transfer of shares to back his claims.
18. The Contemnor/ Applicant in his Further Affidavit sworn on 15<sup>th</sup> March, 2023 lists the following persons as the new Directors of the Interested Party;
  1. John Metho Njoroge



2. Metro Trans Investments Limited.
  3. Metro Class East Africa Limited.
  4. Nik Registrars.
19. The *ex parte* Applicant filed written submissions dated 21<sup>st</sup> April, 2023. The Applicant cites Section 23 of the [Penal Code](#) on the offences by corporations, societies, etc. It also submits that Mr. Omurwa is yet to purge his contempt and that the Interested Party continues to operate in breach of the Court's order.
  20. The *ex parte* Applicant submits that the Contemnor herein Mr. Omurwa described himself as not only a Director but the CEO of the Interested Party Metro Trans EA Ltd in his Replying Affidavit sworn on 15<sup>th</sup> December, 2022.
  21. The case of [Jiang Nan Xiang v Cok Fas-St Company Limited](#) [2018] eKLR is cited on circumstances under which the veil of incorporation can be lifted. The *ex parte* Applicant argues that none of the circumstances listed by the court in the above case arise in our instant case and that at the time when the Contempt of Court arose Mr. Omurwa was a director of the Interested Party.

### **Analysis and Determination**

22. I have considered the motion before this court, the affidavit in support together with the *ex parte* Applicant's replying affidavit and written submissions. The primary issue for determination is whether the Contemnor/Applicant has made out a case for the orders sought.
23. It is trite that the High Court has power to review its own decisions, however it must be emphasized that such power must be exercised within the framework of Section 80 of [Civil Procedure Act](#) and Order 45 Rule 1. Section 80 of the [Civil Procedure Act](#) provides thus: -
  - “ 80. Any person who considers himself aggrieved-
    - (a) by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or
    - (b) by a decree or order from which no appeal is allowed by this Act, may apply for a review of judgement to the court, which passed the decree or made the order, and the court may make such order thereon as it thinks fit.
24. Order 45 Rule 1 of the [Civil Procedure Rules, 2010](#) provides as follows:-
  - (1) Any person considering himself aggrieved-
    - (a) By a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or
    - (b) By a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for review of judgement to the court which passed the decree or made the order without unreasonable delay.”



25. The Court in the case of *Republic v Advocates Disciplinary Tribunal Ex parte Apollo Mboya* [2019] eKLR held as follows;

“27. A court can review a judgment for any other sufficient reason. In the case of *Sadar Mohamed vs Charan Signh and Another*<sup>[16]</sup> it was held that any other sufficient reason for the purposes of review refers to grounds analogous to the other two (for example error on the face of the record and discovery of new matter. Mulla in the *Code of Civil Procedure*<sup>[17]</sup> (writing on Order 47 Rule 1 of the *Civil Procedure Code of India*), (the equivalent of our Order 45 Rule 1), states that the expression 'any other sufficient reason'...means a reason sufficiently analogous to those specified in the rule. Any other attempt, except an attempt to correct an apparent error or an attempt not based on any ground set out..., would amount to an abuse of the liberty given to the tribunal under the Act to review its judgement.<sup>[18]</sup>

28. I also find useful guidance in *Tokesi Mambili and others vs Simion Litsanga*<sup>[19]</sup> where they held as follows:-

- i. In order to obtain a review an applicant has to show to the satisfaction of the court that there has been discovery of new and important matter or evidence which was not within his knowledge or could not be produced at the time when the order to be reviewed was made. An applicant may have to show that there was a mistake or error apparent on the face of the record or for any other sufficient reason. (Emphasis added)
- ii. Where the application is based on sufficient reason it is for the Court to exercise its discretion.”

26. The Court went ahead to state as follows;

“29. I am not persuaded that the reasons offered by the applicant amounts to 'sufficient reason' within the meaning of the rules cited above nor is it analogous or ejusdem generis to the other reasons stipulated in Order 45 Rule 1. My finding is fortified by the holding in the case of *Evan Bwire vs Andrew Nginda*<sup>[20]</sup> where the court held that 'an application for review will only be allowed on very strong grounds particularly if its effect will amount to re-opening the application or case a fresh.

30. The principles which can be culled out from the above noted authorities are:-

- i. A court can review its decision on either of the grounds enumerated in Order 45 Rule 1 and not otherwise.
- ii. The expression "any other sufficient reason" appearing in Order 45 Rule 1 has to be interpreted in the light of other specified grounds.
- iii. An error which is not self-evident and which can be discovered by a long process of reasoning cannot be treated as an error apparent



on the face of record justifying exercise of power under Section 80.

- iv. An erroneous order/decision cannot be corrected in the guise of exercise of power of review.
- v. A decision/order cannot be reviewed under Section 80 on the basis of subsequent decision/judgment of a coordinate or larger Bench of the tribunal or of a superior court.
- vi. While considering an application for review, the court must confine its adjudication with reference to material, which was available at the time of initial decision. The happening of some subsequent event or development cannot be taken note of for declaring the initial order/decision as vitiated by an error apparent.
- vii. Mere discovery of new or important matter or evidence is not sufficient ground for review. The party seeking review has also to show that such matter or evidence was not within its knowledge and even after the exercise of due diligence, the same could not be produced before the court/tribunal earlier.
- viii. A mistake or an error apparent on the face of the record means a mistake or an error, which is prima-facie visible and does not require any detail examination. In the present case the petitioner has not been able to point out any error apparent on the face of the record.
- ix. Section 80 of the *Civil Procedure Code* provides for a substantive power of review by a civil court and consequently by the appellate courts. The words occurring in Section 80 mean subject to such conditions and limitations as may be prescribed thereof and for the said purpose, the procedural conditions contained in Order 45 Rule 1 must be taken into consideration. Section 80 of the *Civil Procedure Code* does not prescribe any limitation on the power of the court, but such limitations have been provided for in Order 45 Rule 1.
- x. The power of a civil court to review its judgment/decision is traceable in Section 80 *CPC*. The grounds on which review can be sought are enumerated in Order 45 Rule 1.”

27. In our instant case the Contemnor/ Applicant herein seeks to have the court’s order of 23<sup>rd</sup> February, 2023 reviewed, varied or set aside on grounds that he resigned from being the CEO/Managing Director of the Interested Party on 1<sup>st</sup> January, 2023. The Contemnor/ Applicant has even produced a list of Directors as seen in the Companies Registry as at 27<sup>th</sup> November, 2020 and 3<sup>rd</sup> January, 2023 and it is evident that he is no longer a Director of the Interested Party.
28. The Court notes that as at 3<sup>rd</sup> January, 2023 the Contemnor/ Applicant was aware that he was no longer a Director of the Interested Party and he therefore ought to have raised this issue with the Court before it rendered its decision on 23<sup>rd</sup> February, 2023.



29. It is trite that a party seeking review has to prove to the Court that the matter or evidence that he intends to rely on in the application for review, setting aside or varying of a Court's order was not within his/her knowledge and that even after the exercise of due diligence, the same could not be produced before the court earlier. On this ground therefore the Contemnor's application must fail.
30. There is also great doubt in the Court's mind on the issue of the Contemnor having resigned as the Chief Executive Officer of the Interested Party as no tangible evidence has been produced before this Court evidencing the same.
31. According to Sections 35 and 36 of the *Employment Act* of 2007, parties to an employment contract may end the agreement by giving the required amount of notice or by paying the other party's salary in place of the notice. Therefore, if a person wants to resign, they must notify their employer in writing, and thereafter serve the notice period or in the alternative pay the employer in lieu of notice and the resignation will take effect.
32. The Court in the case of *Kenneth Onialo v Majlis Resort Lamu t/a Majlis Lamu Ltd* [2022] eKLR reiterated this position as follows;
- “ All the law requires of an employee terminating the contract is to issue the employer with the requisite notice to terminate or pay to the employer an amount equivalent to the notice period should he/she opt not to give notice.”
33. No such notice has been adduced before this Court as evidence to support the Contemnor's application seeking to review, vary or set aside the orders issued on 23<sup>rd</sup> February, 2023.
34. Even then it is common knowledge that an organization can have a Chief Executive Officer who is not a director but is engaged to run an organization and as such the Contemnor's failure to provide evidence of his resignation can mean that although he resigned as a Director he currently still holds the office of Chief Executive Officer of the Interested Party and therefore the orders of 23<sup>rd</sup> February, 2023 still remain in force against him.
35. The Court in the case of *Mengich t/a Mengich & Co Advocates & another v Joseph Mabwai & 10 others* [2018] eKLR held
- “ that Contempt proceedings are quasi-criminal in nature and since the liberty of a person is at stake, the standard of proof is higher than in civil cases.”
- A party that has not heard can therefore not burden with such proceedings.
36. A party cited for contempt of court may have an opportunity to purge his contempt if he/she complies and obeys the court's orders. In our instant case the Contemnor Mr. Omurwa may purge his contempt by complying with the order of court issued on 1<sup>st</sup> Novemebr, 2022.

**Disposition:**

37. In light of the above I find that the Contemnor's application dated 3<sup>rd</sup> March, 2023 lacks merit.

**Order:**

38. The application dated 3<sup>rd</sup> March 2023 is hereby dismissed with costs.  
It is so ordered.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 20<sup>TH</sup> DAY OF JULY 2023**



.....  
**J. CHIGITI (SC)**  
**JUDGE**

