



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

**Okwama v Milestone Gaming Limited & 3 others; Kisia & another (Alleged Contemnors)
(Petition E016 of 2023) [2024] KEHC 14722 (KLR) (21 November 2024) (Ruling)**

Neutral citation: [2024] KEHC 14722 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
PETITION E016 OF 2023
S MBUNGI, J
NOVEMBER 21, 2024**

BETWEEN

EDWARD OKWAMA PETITIONER

AND

MILESTONE GAMING LIMITED 1ST RESPONDENT

STANDARD GLOBAL EAST AFRICA LIMITED 2ND RESPONDENT

KENYA REVENUE AUTHORITY 3RD RESPONDENT

THE ATTORNEY GENERAL 4TH RESPONDENT

AND

L ONG'ERA KISIA ALLEGED CONTEMNOR

WELDON NG'ENO ALLEGED CONTEMNOR

RULING

Background.

1. The Petitioner filed a Petition dated 21st August, 2023 challenging paragraph 4A of Part II of the First Schedule of the *Excise Duty Act* of 2015, which imposes a 12.5% excise duty on players for placing a bet, regardless of whether the player wins or loses. The Petitioner contended that the impugned provision contravenes public finance principles as outlined in Article 201 of *the Constitution* of Kenya, 2010 (*the Constitution*).
2. The Petitioner further contended that the impugned provision contravenes the prescription of taxes under Articles 209 and 210 of *the Constitution* violates various constitutional provisions, including Articles 2 (1) (2) (4), 6 (2), 10, 26, 27, 28, 40, 41 (1) (2) (b) and 4 (a), 43, 46 (1) (c), 110, 186, 189, 201, and 210, as well as established international principles of taxation.



3. The Petitioner sought the following prayers inter alia that the Court declares that the imposition of 12.5% excise duty under paragraph 4A of Part II of the First Schedule of the *Excise Duty Act* of 2015 is discriminatory and violates the Petitioner's right to property hence unconstitutional. The Petitioner further sought to bar the Kenya Revenue Authority from collecting the impugned tax.
4. The court also gave interim conservatory orders on the 21.08.2023.

Application dated 4th September, 2023 and 18th September, 2023.

5. Both applications filed by the petitioner sought the following orders: -
 - I. That summons be issued by this Honorable Court against the alleged contemnors who are employees, servants and/or agents of the 3rd respondent to show cause why they should not be committed to Civil Jail for such term as the Honorable Court and/or Fine as may be decided by the Court may deem just for willful disregard and disobedience of a valid Court Order issued by this Honorable Court on the 21st August 2023.
 - II. That the Honorable court be pleased to cite the alleged contemnors as employees, servants and/or agents of the 3rd Respondent, for contempt of this Court's Order issued on the 21st August, 2023 and further to order that they be committed to civil jail for a term not exceeding six months and/ or Fine as may be decided by the court.
 - III. That the alleged employees, servants and/or agents of the 3rd Respondent be committed to civil jail for a period of Six (6) months or other period or any other sanction as this Court may deem fit and appropriate and ordered to pay a fine for an amount in Kenya Shillings as will be determined by this Honorable Court for willful disobedience of a valid Court Order issued by this Honorable Court on the 21st August 2023.
 - IV. That the costs of this application be provided for.
6. Both applications were supported by affidavits sworn by the petitioner and other annexures attached.
7. The substance of the petitioner's averments was that the alleged contemnors herein were in contempt of the court for disobedience of the orders of the Court issued on 21st August, 2023 following the letters written by the two officers on 29th August, 2023 and 8th September, 2023 respectively to the 1st and 2nd respondents demanding that they deduct and remit 12.5% excise duty contrary to the orders issued by the court on 21st August, 2023.
8. Parties filed responses to the applications by the petitioner.

Petitioner/Applicant's Case.

9. Vide his submissions, the applicant submitted that the 3rd respondent and its agent were knowledgeable of the court order and failed to comply with the same when they served the 2nd respondent with a demand letter requiring that they deduct 12.5% excise duty tax from bets as per paragraph 4A of Part II of the First Schedule of *Excise Duty Act*, 2015.
10. The applicant filed a further supporting affidavit stating that the replying affidavit by the 3rd respondent's agent was bereft of legal merit as the terms and orders of the court were framed in express and unequivocal terms such that the said contemnor cannot allege confusion as a ground to disobey the court orders.



11. Additionally, the petitioner stated that the Court of Appeal and Supreme Court rulings did not in any way interfere with the orders of this Court.

2nd Respondent's Case.

12. The 2nd respondent filed submissions and replying affidavit to the application dated 04.09.2023. Vide the affidavit sworn by one Fred Ngara, the 2nd respondent stated that despite the orders granted by this court being served upon the 3rd respondent, it proceeded, in contempt of the court orders, to serve a letter upon the 2nd respondent requiring that the company deduct and remit 12.5% excise duty to the 3rd respondent.
13. He further stated that the 3rd respondent has neither withdrawn nor retracted the content of its letter dated 29th August, 2023.

3rd Respondent's Case.

14. The alleged contemnor filed a replying affidavit to the application dated 04.09.2023 and stated that following the Ruling of the Court of Appeal, the 3rd Respondent thought that it was now at liberty to enforce the entire Finance Act, 2023 until the cases before the High Court challenging its constitutionality were heard and determined. Further, she averred that while the Court of Appeal Order was a general order affecting all taxpayers, and the entire Finance Act, this Honorable Court's order was a specific order restraining implementation of the impugned paragraph 4A of Part II of the First Schedule of Excise Duty Act, 2015 on only the 1st and 2nd Respondents.
15. She stated that there being two conflicting Orders (that of this Honorable Court and that of the Court of Appeal) the 3rd Respondent thought that it was prudent to inform the affected parties of the existence of the two orders and its understanding of the same, hence it is on that premise that the alleged contemnor cited herein, on behalf of the 3rd Respondent wrote the letter dated 29th August 2023 advising the 2nd Respondent of the existence of an Order from the Court of Appeal and the 3rd Respondent's understanding of the same.
16. She also stated that the writing of the letter dated 29th of August 2023 was further necessitated by the fact that other sector players had raised complaints to the 3rd Respondent that their business was not competitive as they were losing business to the 1st and 2nd Respondents, who were not deducting and remitting the 12.5% excise duty on betting and the 1st and 2nd Respondents were enjoying an advantage over the other companies.
17. Further the 3rd Respondent's understanding of this Honorable Court's Order is that it was restrained from implementation of Paragraph 4A Part II of the First Schedule to the Excise Duty Act and that the 3rd Respondent's letter dated 29th August 2023 does not in any way amount to implementation of Paragraph 4A Part II of the First Schedule to the Excise Duty Act.
18. In a further affidavit, the alleged contemnor (Weldon Ng'eno) averred that the 1st respondent having objected to the demand letter of 08.09.2023 vide a letter dated 12.09.2023 under Section 51 of the Tax Procedures Act, it was a show that the 1st respondent and the petitioner were well aware that the taxes therein had not crystalized. Therefore, the said letter cannot form a basis of contempt since there is a legal procedure of challenging the commissioner's decision rendered under Section 51 of the Tax Procedures Act.
19. Vide submissions dated 28.09.2023, the 3rd respondent submitted that the alleged contemnors did not deliberately disobey the orders of the Court but were confused as to the terms of the orders which



they were to obey, there being two orders of the Court of Appeal and Supreme Court which directed them to fully implement the provisions of the Finance Act 2023 and the current Court's orders which stopped the implementation of the specific Paragraph of the Finance Act 2023 as against the 1st and 2nd Respondent only.

20. Further, the 3rd respondent submitted that the alleged contemnors having not been personally served as required under Rule 81.6 of the English Civil Procedure Rule and the Court having not dispensed with service, they cannot be cited for contempt.
21. Lastly, the 3rd respondent submitted that there has been no evidence of remittance of any taxes, collection of the taxes or initiation of enforcement measures which would have been what amount to breach, the Applications are misconceived; further stating that the letters of 28th August, 2023 and 8th September, 2023 having been overtaken by events the two applications are now moot.

Analysis.

22. I have looked at the application, the supporting affidavits, the replying affidavits, submissions and the authorities cited by the counsels of the parties.
23. It is not disputed that L. Ong'era Kisia an agent of the 3rd respondent authored the letter dated 29.08.2023 and Weldon Ng'eno authored the letter dated 08.09.2023, respectively to the 1st and 2nd respondents which the applicant alleges the said letters were in contempt of the court orders issued on 21.08.2023.
24. The orders were styled as follows:
 - i. That leave to be heard during the vacation granted.
 - ii. That pending hearing and determination of this application inter-parties, there be and is hereby issued a temporary conservatory order restraining the 1st and 2nd Respondents from deducting 12.5% excise duty from the petitioner and other players/wagers as provided for under paragraph 4A of Part 11 of the First Schedule of the [Excise Duty Act](#) of 2015.
 - iii. That, pending hearing and determination of this application inter-parties there be and is hereby issued a temporary conservatory order restraining the 3rd Respondent whether acting jointly or severally by themselves, their servants, agents, representatives or howsoever otherwise from the implementation of Paragraph 4A of Part 11 of the First Schedule of the [Excise Duty Act](#) of 2015 as against the 1st and 2nd Respondents.
 - iv. That prayers granted in 2 and 3 above shall operate for a period of 30 days and on terms that, the application be served forthwith upon all respondents to enable them respond thereto within 14 days from today.
 - v. That thereafter parties shall have a period of 20 days to file and exchange submissions.
 - vi. That mention on 21.09.2023.
25. The letter written by L. Ong'era Kisia dated 29.08.2023 to the 2nd respondent in part stated:

“We gave instructions to our counsel on record to challenge that Order by filing an urgent application seeking to set aside the impugned order of 21st August 2023 on grounds of res judicata and material non-disclosure. The application was filed and certified as urgent and given a date of 5th September 2023. Details herein are well within your knowledge, service of the application having been effected upon yourselves or your counsel on record.



It is in the public domain that the Court of Appeal, which is a superior Court than the Court in Kakamega, on 28th July 2023 set aside the High Court Orders which had suspended the application of the Finance Act 2023. We attach a copy of the Court of Appeal Ruling for your information and compliance.

Consequently, the Court of Appeal having already heard the issues and allowed the implementation of the Finance Act 2023, the same is fully operational and in effect.

Take notice that you are therefore required to strictly comply with the [Excise Duty Act](#) and deduct 12.5% excise duty tax from bets as per paragraph 4A of paragraph II of the First Schedule of [Excise Duty Act](#) 2015. You are required to account for the excise duty tax and remit it to Kenya Revenue Authority as expected of you.

Take further notice that failure to deduct and remit the 12.5% of excise duty tax abovementioned is at your peril as the KRA will issue the relevant assessments and proceed to enforce collection of the tax, in addition to taking other necessary measures against yourselves.

Kindly but urgently account for your daily Excise duty for the period 24th August 2023 to date and remit the unpaid tax amounts without fail by 30th August 2023.”

26. The letter by Weldon Ng'eno in part stated:

“We refer to our letter dated the 29th August 2023 which required you to strictly comply with the [Excise duty Act](#) and deduct 12.5% Excise Duty Tax on stakes as per paragraph 4A of Part II of the first schedule: to the [Excise duty Act](#) 2015.

We have noted from the data transmitted daily to KRA by yourselves that you have not been remitting fully the daily Excise duty payments as expected by law from the 24th August 2023 to 7th September 2023

This has accumulated tax liability amounting to Kshs 61,153,310, as tabulated below.

.....

You are therefore required to make immediate payments of Kshs 61,153,310, failure to which enforcement collection measures shall be instituted to recover the tax as provided for under section 42 of the [Tax procedures Act](#), 2015 without any further reference to you.”

27. To this court the issue for determination, is whether by writing the above letters to the 1st and 2nd respondent where the authors in contempt of court orders issued on 21.08.2023.

The law

28. The law of contempt and the power of the court to punish contemnor is found under Section 5 of the [Judicature Act](#) which provides as follows:

Contempt of court

- (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 such 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 the exercise of the ordinary original criminal jurisdiction of the High Court.

29. Section 63(c) and (e) of the *Civil Procedure Act* state:

Supplemental proceedings

In order to prevent the ends of justice from being defeated, the court may, if it is so prescribed

—

- (c) grant a temporary injunction and in case of disobedience commit the person guilty thereof to prison and order that his property be attached and sold;
- (e) make such other interlocutory orders as may appear to the court to be just and convenient.

30. Order 40 Rule 3 states:

“Consequence of breach [Order 40, rule 3.]

- (1) In cases of disobedience, or of breach of any such terms, the court granting an injunction may order the property of the person guilty of such disobedience or breach to be attached, and may also order such person to be detained in prison for a term not exceeding six months unless in the meantime the court directs his release.
- (2) No attachment under this rule shall remain in force for more than one year, at the end of which time, if the disobedience or breach continues, the property attached may be sold, and out of the proceeds the court may award such compensation as it thinks fit, and shall pay the balance, if any, to the party entitled thereto.
- (3) An application under this rule shall be made by notice of motion in the same suit.”

31. Section 30 (5) and (6) of the *contempt of Court Act* provides as follows:

- (5) Where the contempt of court is committed by a State organ, government department, ministry or corporation, and it is proved to the satisfaction of the court that the contempt has been committed with the consent or connivance of, or is attributable to any neglect on the part of any accounting officer, such accounting officer shall be deemed to be guilty of the contempt and may with the leave of the court be liable to a fine not exceeding two hundred thousand shillings.
- (6) No State officer or public officer shall be convicted of contempt of court for the execution of his duties in good faith.

Case Law.

32. Counsels for the parties have cited authorities which give guidelines to a court in determining whether a party is in contempt or not. I will pick a few for illustration.



- i. The alleged contemnor's counsel has cited The Court in Kenya Human Rights Commission v Attorney General & another where it was stated as follows:

“Contempt is the willful disobedience or disregard of a court orders, judgments decrees or directions. It is therefore the offence of being disobedient or discourteous towards courts and their officers in the form of behavior that opposes or defies the authority, justice and dignity of the court. Contempt manifests itself in the willful and intentional disregard of or disrespect for the authority of the courts, a behavior that is regarded illegal because does not obey or respect the authority of the courts and their processes and tends to lower the dignity of the courts. ”

- ii. Mativo J in Samuel M. N. Mweru & Others v National Land Commission & 2 others [2020] eKLR held as follows: -

“It is an established principle of law that in order to succeed in civil contempt proceedings, the applicant has to prove

1. the terms of the order,
- (2) Knowledge of these terms by the Respondent,
- (3) Failure by the Respondent to comply with the terms of the order. Upon proof of these requirements the presence of willfulness and bad faith on the part of the Respondent would normally be inferred.

- iii. The Court in Samuel M. N. Mweru & Others v National Land Commission & 2 others [2020] eKLR quoted with approval the learned authors of the book Contempt in Modern New Zealand who succinctly stated:-

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.

33. The applicant and 2nd respondent counsel have also cited the case of Samuel M. N. Mweru & Others v National Land Commission & 2 others.

34. The applicant on reason where a court should punish contempt of court order cited the following authorities:



- i. The Court of Appeal in *Refrigerator & Kitchen Utensils Ltd. vs. Gulabchand Popatlal Shah & Others* Civil Application No. Nai. 39 of 1990. In *Wildlife Lodges Ltd vs. County Council of Narok and Another* [20051 2 EA 344 (HCK) the Court expressed itself thus:

“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 until that order 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. 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 existed it must not be disobeyed...If there is a misapprehension in the minds of the defendants as to the reasonable meaning of the order, then the expectation of them is that they would have made an application to the court for the resolution of any misunderstanding and this would have been the lawful course. Consistent obedience to court orders is required, and parties should not take it upon themselves to decide on their own which court orders are to be obeyed and which ones overlooked, in the supposition that this oversight will not impede the process of justice.... An ex parte order by the court is a valid order like any other and to obey orders of the court is to obey orders made both ex parte and inter partes since the Court by section 60 of *the Constitution* is the repository of unlimited first instance jurisdiction, and in this capacity it may make ex parte orders where, after a careful and impartial consideration, it is convinced that issuance of such an order is just and equitable. There is nothing potentially oppressive in an ex parte order, since such an order stands open to be set aside by simple application, before the very same court... Where a party considers an ex parte order to cause him undue hardship, simple application will create an opportunity for an appropriate variation to be effected thereto; and therefore there will be no excuse for a party to disobey a court order merely on the grounds that it had been made ex parte and this argument will not avail either the first or the second defendant”.

- ii. As was held in *Teacher's Service Commission Vs. 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.”

iii. Ojwang J (as he then was) in *B vs. Attorney General* [2004] 1 KLR 431 stated that:

“The Court does not, and ought not to be seen to, make Orders in vain; otherwise the Court would be exposed to ridicule, and no agency of the constitutional order would then be left in place to serve as a guarantee for legality, and for the rights of people.”

35. Taking into account all the material placed before me, the following issues are ripe for determination.

- I. Who has the burden of proof in contempt of court proceedings.
- II. The standard of proof required.
- III. Whether the terms of the order were clear or ambiguous.
- IV. Whether the alleged contemnors had knowledge of the terms of the order.
- V. Whether the alleged contemnors acted in breach of the orders.
- VI. Whether the alleged contemnors failure to abide was deliberate.

Determination

Issue 1: Who has the burden of proof in contempt of court proceedings.

36. The burden of proof ordinarily lies with the party alleging that a particular fact exists and wants the court to believe in its existence. Section 107 of the *Evidence Act* provides as follows:

107. Burden of proof

- (1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
- (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

Section 109 of the *Evidence Act* also states:

“Proof of particular fact

The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.”

37. The contemnor’s counsel quoted the case of *Alice Wanjiru Ruhiu v Messiac Assembly of Yahweh* [2021] eKL.R with regard to burden of proof at Par. 22 which referred to *The Halsbury’s Laws of England*, 4th Edition, Volume 17, at paragraphs 13 and 14 which I find to be a good guide. That court said:

“The legal burden is the burden of proof which remains constant throughout a trial; it is the burden of establishing the facts and contentions which will support a party’s case. If at the



conclusion of the trial he has failed to establish these to the appropriate standard, he will lose. The legal burden of proof normally rests upon the party desiring the court to take action; thus a claimant must satisfy the court or tribunal that the conditions which entitle him to an award have been satisfied. In respect of a particular allegation, the burden lies upon the party for whom substantiation of that particular allegation is an essential of his case. There may therefore be separate burdens in a case with separate issues."

(16) The legal burden is discharged by way of evidence, with the opposing party having a corresponding duty of adducing evidence in rebuttal. This constitutes evidential burden. Therefore, while both the legal and evidential burdens initially rested upon the appellant, the evidential burden may shift in the course of trial, depending on the evidence adduced. As the weight of evidence given by either side during the trial varies, so will the evidential burden shift to the party who would fail without further evidence?"

Issue 2: The standard of proof required.

38. The threshold for proof required in contempt of court is higher than the standard of proof required in normal civil cases, and one can only be committed to civil jail or otherwise penalized on the basis of evidence that is cogent enough to make the court believe that the contemnor was in breach of the court order. (See *Mwangi H.C Wangondu vs Nairobi City Commission*, Nairobi Civil Appeal No. 95 of 1998)
39. From the above, it is incumbent upon the applicant to adduce evidence which satisfies the court that the terms of the order issued on 21.08.2023 were clear and unambiguous, the alleged contemnors had knowledge of the terms of the order, the alleged contemnors breached the orders, and the breach was deliberate. Evidence which the alleged contemnors cannot shake in rebuttal.

Issue 3: Were the terms of the order clear?

40. On this, the applicant submitted that the orders issued on 21.08.2023 were in existence at the time of the disobedience and were not set aside, they were clear, made in plain language, expressed in written form and unambiguous.
41. Order No. 2 restrained in other words stopped, prohibited or prevented the 1st and 2nd respondents temporarily from deducting 12.5% excise duty from the petitioner and other players/wagers as provided for under paragraph 4A of Part 11 of the First Schedule of the *Excise Duty Act* of 2015 during the pendency of hearing of the Petitioner's application for conservatory orders.
42. Order No. 3 restrained in other simple terms stopped, prohibited or prevented the 3rd Respondent herein Kenya Revenue Authority, or its employees, servants agents, representatives or any person acting alone or jointly with other persons temporarily from demanding the 12.5% excise duty tax from the 1st and 2nd respondents (herein Milestone Gaming Limited and Standard Global East Africa Limited) as provided under Paragraph 4A of Part 11 of the First Schedule of the *Excise Duty Act* of 2015 during the pendency of the hearing of the Petitioner's application for conservatory orders.
43. The Court went further to limit the grant of those orders to last, to operate for a period of 30 days and on terms that, the application be served forthwith upon all respondents to enable them respond thereto within 14 days from today.
44. It was his submission that the orders were plain, clear and unambiguous. In any event, it is trite law that a party can always approach the court to clarify any difficulty or misunderstanding of a court order.



45. In this case, the Ms. L. Ong'era Kisia, an employee and officer of the 3rd Respondent took the matters in her own hands without any reference or recourse to the Court for any clarity of misunderstandings of the terms of the order.
46. The applicant referred the court to Odunga J's (as he then was) decision in the case of Republic v Principal Secretary, Ministry of Defence Ex-Parte George Kariuki Waithaka [2018] eKLR in case of disobedience of a court order by a public offer was so emphatic about the mandatory nature of compliance with Court Orders where he stated :

“It must however be remembered that Court orders are not made in vain and are meant to be complied with. If for any reason a party has difficulty in complying with court orders the honourable thing to do is to come back to court and explain the difficulties faced by the need to comply with the order. Once a Court order is made in a suit the same is valid unless set aside on review or on appeal.

The learned Judge also cited with approval the case of Econet Wireless Kenya Ltd vs. Minister for Information & Communication of Kenya & Another [2005] 1 KLR 828, Ibrahim, J (as he then was) stated:

“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. 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”

47. The 2nd respondent's submissions on this elements (Whether the terms of the order were clear and unambiguous) mirrored the submissions by the applicant.
48. In rebuttal, the contemnors in joint submissions stated that the terms of the Orders of 21.08.2023 of this Honorable Court were contradictory to the Orders issued by the Court of Appeal on 28.07.2023 and which Court of Appeal Orders were affirmed by the Supreme Court Orders of 08.09.2023. The three Orders dealt with the same subject matter which was the implementation of the provisions of the Finance Act, 2023.

Finding of the Court.

49. I have considered the rival submissions. The contemnors have not addressed on whether the terms or the wording of the orders of 21.08.2023 were clear and the wording passed the message meant to be passed to the concerned parties. I have read the orders carefully. To this court, the language used and the wording was so simple, such that anybody having a read of them would without any difficulty ascertain the meaning and the message intended to be passed.
50. Therefore, it is my finding that the applicant has discharged his burden on this aspect.

Issue 4: Whether the alleged contemnors had knowledge of the terms of the order.

51. The applicant averred that the alleged contemnors were aware and to demonstrate that the 3rd Respondent and L. Ong'era Kisia had knowledge of the existence of the Court Order, he submitted



that the Court Order and Pleadings were served on the 3rd Respondent via a licensed process server on the 23.08.2023. The Order and Affidavit of Return of Service is acknowledged and stamped by the authorized officer of the 3rd Respondent. As a sign of knowledge of the Court Order, the 3rd Respondent through their in house counsel and an employee of the 3rd Respondent Ms. Judith N. Kithinji-advocate entered appearance and filed an application under Certificate of Urgency dated 24.08.2023 seeking orders to set aside the prevailing conservatory orders issued by this honorable court on the 21.08.2023. The Honorable Court certified that matter urgent and directed that the application to be heard on the 05.09.2023 before the duty court and in the presence of all parties. Ms. L. Ong'era Kisia had full knowledge and understanding of the Court Order. Her letter dated 29.08.2023 challenging the Court Orders is titled in the name of the Petition "Kakamega High Court Petition Number E016 of 2023; Edward Okwama Vs Milestone Gaming Ltd, Standard Global East Africa Ltd, Kenya Revenue Authority And The Attorney General". In the said letter, she reproduces the orders of the court verbatim however she decides to sit as an appellate Court and give her own interpretation of the meanings notwithstanding the existence of their application to set aside the Court Order.

52. The 3rd Respondent and more so its employees, L Ong'era Kisia and Weldon Ng'eno had no authority to question the meaning or attribute and substitute her own understanding of a convenient meaning of the Orders. All they had to do was to comply with the Court order or seek a clarification of the Court or indeed as they did file an application for review of the Court Order. In this case, she had no patience to wait for the outcome of their own application.
53. The 2nd respondent's submissions on this issue (Whether the alleged contemnors had knowledge of the terms of the order) were similar to the submissions by the applicant.
54. In rebuttal, the contemnors submitted that the 3rd Respondent is a vast organization and there was nothing that prevented Petitioner together with the 1st and 2nd Respondents to personally serve the exact persons who dealt with their tax issues directly. Knowledge of the order should always be considered as personal service of the order as it is the personal service of the order that enable the sustenance of Contempt proceedings. This is especially where the persons being cited for contempt are not the legal accounting officers of the organization.
55. For the 2nd alleged contemnor nothing has been placed before the court to show that the Order of 21.08.2023 was ever personally served upon him.
56. Further the letters having been a demand and a tax decision within section 50 of the [Tax Procedures Act](#), the 1st and 2nd Respondents are required to at that point to bring to the attention of the alleged contemnors through an objection under Section 51 (1) and (2) of the [Tax Procedures Act](#) (TPA), the said provisions provide as follows:
 - (1) A taxpayer who wishes to dispute a tax decision shall first lodge an objection against that tax decision under this section before proceeding under any other written law.
 - (2) A taxpayer who disputes a tax decision may lodge a notice of objection to the decision, in writing, with the Commissioner within thirty days of being notified of the decision.

This provision goes to the jurisdiction of this Court to address the demands at this point. At this point what the Court is dealing with is an apprehension that a breach will occur. The provision is a non obstante clause. Section 51 (1) of the TPA, granted the 1st and 2nd Respondents an opportunity to personally serve the Order directly to the persons they wanted to cite.



57. The law on the personal service of court orders is now found in Rule 81.8 of the English Civil Procedure Rules. The said rule provides that unless the court dispenses with service, a judgment or order may not be enforced by way of an order for committal unless a copy of it has been served on the person required to do or not do the act in question.
58. Rule 81.6 of the English Civil Procedure Rules specifically provides that the method of service shall be personal service, which is effected by leaving the order with the person to be served.
59. Rule 81.9 (1) of the English Civil Procedure Rules of 1998 is also clear that a judgment or order to do or not do an act may not be enforced unless there is a prominently displayed a warning to the person that disobedience to the order would be a contempt of court punishable by imprisonment, a fine or sequestration of assets.
60. Under sub-rule (2) of the said Rule, it is only in the case of an undertaking to do or not to do an act which is contained in a judgment or order where the notice of penal consequences may be dispensed with.
61. The Court in Jackson Omwenga T/A Jackson Omwenga & Co. Advocates v Harambee Sacco Society Ltd & another [2014] eKLR noted that Kenyan courts have also held that personal service of orders and a penal notice is a requirement in contempt of court proceedings, and reference is made to the Court of Appeal decisions in Nyamogo & Another v Kenya Posts and Telecommunications Corporation, (1994) KLR 1, and Ochino & Another v Okombo & 4 others (1989) KLR 165 in this respect.
62. In the current case, no motion was made for the Court to dispense with personal service, it therefore follows that the issue of the knowledge of the terms of the Court Order by the two alleged contemnors has not been proved.

Finding of the court.

63. The two alleged contemnors contend that they had no knowledge of the terms of the order of 21.08.2023 for it was not personally served upon the alleged contemnors as required by Rule 81(8), (6) and (9) of the English Civil Procedure Rules.
64. The two alleged contemnors have not laid legal basis on why this court should rely on English Law while in Kenya we have substantive law dealing with service of court processes.
65. There is enough case law to show that in Kenya, the aspect of personal service of court order subject of contempt proceedings is not mandatory as a proof of knowledge of the particular court order. What is important is whether the alleged contemnor had knowledge of the particular court order. In *Basil Criticos v Attorney General and 8 Others* [2012] eKLR the court reiterated the issue of the knowledge of the order in the following words: -

“... the law has changed and as it stands today knowledge supersedes personal service... where a party clearly acts and shows that he had knowledge of a Court Order; the strict requirement that personal service must be proved is rendered unnecessary.”
66. In *Sang v Keter & 5 others (Environment & Land Case E010 of 2023)* [2024] KEELRC 2376 (KLR) the court held as follows:

“...Previously, courts were of the opinion that this awareness of the order was proved by establishing personal service of the subject order and the attendant penal notice upon the alleged contemnor (see in *Nyamogo & Another vs Kenya Posts and Telecommunications*



Corporation (1994) KLR 141). This position has however shifted in recent years, and courts have held that it is sufficient for the applicant to demonstrate awareness and/or knowledge by the alleged contemnor of the orders. Had the Defendants made their contention before this shift in jurisprudence, this court would have insisted that personal service of the orders in question was mandatory. However, as the law stands right now, personal service of the order upon the contemnor is not necessary where knowledge of the order is proved...”

67. I have no doubt that the 3rd respondent and the two alleged contemnors had the knowledge of the court order of 21.08.2023 for there is an affidavit of service to show that the orders were served and copies of the applicant were duly stamped by the 3rd respondent’s authorized officer. Secondly, a look at the letter written by L. Ong’era Kisia dated 29.08.2023 as submitted by the 2nd respondent’s counsel the letter commences: “We are informed by our counsel on record that on 23rd August, 2023 the Kenya Revenue authority was served with a Court order dated 21st August, 2023”.

The alleged Contemnor then goes further to replicate in its letter the orders of the honorable court. The alleged contemnor then proceeds to interpret the order of the court terming the matter as res-judicata and refers to the court of appeal decision. The contemnor then concludes by asking the 2nd Respondent to deduct and remit the due taxes.

68. The 2nd contemnor, Weldon Ng’eno in his letter dated 08.09.2023 referred to the letter dated 29.08.2023, authored by L. Ong’era Kisia.

69. The alleged 1st contemnor in her letter dated 29.08.2023, talks of having been advised by their advocate. To this court, knowledge of the court order of 21.08.2023 by the alleged contemnor’s advocate is enough for this court to find that the alleged contemnors were possessed on proper knowledge and import of the said orders. In the case of Shimmers Plaza Limited v National Bank of Kenya Limited [2015] eKLR the honorable court. stated as follows: -

“Would the knowledge of the judgment or order by the advocate of the alleged contemnor suffice for contempt proceedings” We hold the view that it does. This is more so in a case such as this one where the advocate was in Court representing the alleged contemnor and the orders were made in his presence. There is an assumption which is not unfounded, and which in our view is irrefutable to the effect that when an advocate appears in court on instructions of a party, then it behoves him/her to report back to the client all that transpired in court that has a bearing on the client’s case.”

Issue 5: Whether the alleged contemnors acted in breach of the orders.

70. On this, the applicant submitted that Ms. L. Ong’era Kisia failed to comply with the terms of the Court Order. The letter she authored on the 27.08.2023 was akin to sitting as the Court of Appeal, she interpreted the orders in the manner she wanted and gave the Orders her own meanings. She dismissed the finding of law made by the court in issuing of the interim conservatory orders and directed the 1st and 2nd Respondents to act in disobedience of the Orders.
71. The letter further expressly directed, commanded and threatened the 1st and 2nd Respondents to disobey the Court Order or face untold consequences.
72. The 2nd respondent’s counsel submitted that the court should take judicial notice that the only way the 3rd Respondent could enforce the collection of the excise duty was through the 1st and 2nd Respondent was by demanding that the 2nd Respondent collects and remits the 12.5% when there was a valid court order known to them was a clear and blatant disobedience of the order of the court.



73. If the alleged contemnor was acting in good faith, they would have approached the honorable court for reprieve. Instead, they chose to take matters in their own hands, interpreted the order of the court by themselves, stripped the court of Jurisdiction by claiming that the matter is res-judicata and ultimately told the 2nd Respondent that the order to be obeyed is not the order of this court issued on 21st August, 2023 but rather, the order of the court of appeal issued on 28th July, 2023. It is worth noting that the 2nd Respondent was not a party to the court of appeal matter in Civil application number E304 of 2023.
74. In rebuttal, the alleged contemnors submitted that The court had ordered that there be no deductions of excise duty as against the Punters by the 1st and 2nd Respondent.
75. A perusal of the applications dated 4th September, 2023 and 18th September, 2023 shows no evidence which is before this Court suggesting that there has been any deduction of excise duty at the rate of 12.5% by the 1st or the 2nd Respondents.
76. Further, the Petitioner has not provided any evidence of deduction of excise duty at 12.5% for the period the order was in existence which would amount to breach of the orders of the court.
77. The applications are therefore premised on mere apprehension/ fear that the letters would lead to deduction of excise duty and not that there was/is actual deduction which has been occasioned.
78. In fact, the 1st and 2nd Respondents' Counsels confirmed to the Court on record on 21st September, 2023 that they had not made the deduction since their clients were served with the Orders and they were not in contempt. If the 1st and 2nd Respondents have not made any deductions, it is possible for the 3rd Respondent to be in contempt?
79. The answer is that it is not possible for the 3rd Respondent to be in contempt because they have not implemented the impugned court order as no revenue has been collected and no enforcement measures have taken place.
80. The Applications are misconceived as to the tax process and at what point tax crystallize. Further it based on the belief that should the 1 & 2nd Respondents object then the 3rd Respondent will proceed to confirm the remittance, this is purely apprehension.
81. Even if the objection decision was to confirm the taxes, the 1st and 2nd Respondents would have an opportunity to challenge that the decision before the Tax Appeals Tribunal, the High Court and finally the Court of Appeal.
82. The Courts have been very cautious not to issue orders based on apprehension of breach of Orders as was in Pet No 47 of 2020: Miguna Miguna v the Lufthansa Group and 5 others stated as follows at Par. 36 and 37.
83. The petitioner's case is founded on the apprehension that history will repeat itself without evidence being adduced in support.
84. The court cannot rely on speculations to grant the sought orders.
85. It was their humble finding that the matter at this stage is merely speculative.
86. It is reasonable in a nutshell to state that the petitioner has not discharged his burden of proof as required by the law. It would consequently be arbitrary to issue the order as sought, at this stage.



Finding of the Court.

87. The question to answer is whether by the act of the two alleged contemnors of writing the two letters to the 1st and 2nd respondent an act which can be said they were in process of implementing the provisions of paragraph 4A part 11 of the First Schedule which implementation would have been stopped by the court orders of 21.08.2023.
88. For avoidance of doubt, the court order was styled as follows:
- “...THAT pending the hearing and determination of the Application inter-parties, there be and is hereby issued a temporary conservatory orders restraining the 3d Respondent whether acting jointly or severally by themselves, their servants, agents, representatives, or howsoever otherwise from implementation of paragraph 4A of Part II of the First Schedule of the Excise Duty Act, 2015...”
89. The beginning point is what does the word implement mean?
90. According to the Black Law Dictionary, the word implement means to carry out a plan, put a law or policy into effect, or fulfill a promise.
91. The alleged contemnors in their letters to the 1st and 2nd respondent demanded the 1st and 2nd respondent to comply with the provisions of paragraph 4A part 11 of the First Schedule. By this, they were putting the said provision into effect. It does not matter whether the 1st and 2nd respondent complied or not. By writing to them and demanding compliance, the alleged contemnors were taking steps to effect/implement the provisions of paragraph 4A part 11 of the First Schedule which was contrary to the orders issued by this court on 21.08.2023.
92. Therefore, the upshot of the above is that I am satisfied that the applicant has discharged the burden of proof in this aspect and it is my finding that the alleged contemnors acted in breach of the terms of the court order of 21.08.2023.

Issue 6: Whether the alleged contemnors failure to abide was deliberate.

93. The applicant submitted that the alleged contemnors acted deliberately for they had the option of coming back to court for clarification before they authored the letters complained of.
94. The 2nd respondent in support submitted that the alleged contemnors act was deliberate for the following reasons:
- a. The alleged contemnors had at their disposal the advice of a competent counsel and indeed admits to have been advised.
 - b. Secondly, the words of the letter show lack of consideration or respect for the order of the court. The letter by the alleged contemnor is express and out rightly defiant. For instance, the alleged contemnor says:-
 - i. “We gave instructions to our counsel on record to challenge that Order by filing an urgent application seeking to set aside the impugned order of 21st August, 2023 on grounds of res-judicata and material non-disclosure.” the alleged contemnor by themselves, without seeking the interpretation from this court or appealing the order refers to the order of the court as ‘impugned.’”



- ii. "It is in public domain that the Court of Appeal, which is a superior court that the Court in Kakamega, on 28th July, 2023 set aside the High Court Orders..." again, the alleged contemnor considers the order of this honorable court to be inferior and not worth of respect. This, we dare submit, is demeaning the authority of the Honourable court.
 - iii. "...you are therefore required to strictly comply with the [Excise Duty Act](#) and deduct 12.5% excise duty tax from bets as per paragraph 4A of part 11 of the First Schedule of the [Excise Duty Act](#) 2015...". This illegal order by the alleged contemnor was made despite the fact that the alleged contemnor was aware of the order number three which restrained the 3rd Respondent from enforcing the impugned provision of the [Excise duty Act](#).
 - iv. "...failure to deduct and remit the 12.5% of excise duty tax abovementioned is at your peril as the KRA will issue assessments and proceed to enforce collection of tax, in addition to taking necessary measures against yourselves..." The alleged contemnor even goes further to issue a judgment through the above warning despite quoting the order of the court.
- c) Despite all these, the alleged contemnor has not shown any remorse.
95. Further, the 2nd respondent submitted that Instead of owning up and apologizing to the court, the alleged contemnors have sought to argue that there was confusion and uncertainty created by multiplicity of orders as to what to comply with. This is well captured in the alleged contemnor's submissions at paragraph 12 through 13 and further arguing at paragraph 14 that they resolved to employ rules of interpretation. It is trite that where there is uncertainty as to what the order of the court says, the aggrieved party should move the court for interpretation.
96. In rebuttal, the alleged contemnors submitted that they did not deliberately ignore the court orders for there were other two orders; one issued on 28.07.2023 by the Court of Appeal in Nairobi Court of Appeal Civil Application No. E304 of 2023 - The Cabinet Secretary for the National Treasury and Planning and the Honourable Attorney General vs Okiya Omtatah Okoiti & others lifting the Order made by the High Court on 10th July 2023 suspending and prohibiting the implementation of the Finance Act, 2023 hence paving way for implementation of the Finance Act, 2023 in its entirety.
97. On 21st August, 2023, this Honorable Court issued an ex-parte interim conservatory order restraining the 1st and 2nd Respondents from deducting 12.5% excise duty from the Petitioner and other players/ wagers as provided for under paragraph 4A of Part II of the First Schedule to the [Excise Duty Act](#) as amended by the Finance Act, 2023. The order further restrained the 3rd Respondent from implementing the provisions of Paragraph 4A of Part II of the First Schedule to the [Excise Duty Act](#) 2015 as amended by the Finance Act, 2023 as against the 1 and 2nd Respondents. On 8th September 2023, there was a new development touching on the Finance Act 2023 since on that day the Supreme Court of Kenya rendered a Ruling in Supreme Court of Kenya Application No. E029 of 2023 - Okiya Omtatah Okoiti & others vs the Cabinet Secretary for the National Treasury and Planning & others; affirming the Court of Appeal decision of 28th July 2023, allowing the implementation of the Finance Act 2023 in entirety. The 3rd Respondent submitted that the three orders created confusion and uncertainty in that by dint of the Ruling of the Court of Appeal, the understanding of the 3rd Respondent was that it was now at liberty to enforce the entire Finance Act, 2023 while the Orders of the Honourable Court was a specific order restraining implementation of the impugned section of the same Finance Act 2023 on only the 1st and 2nd Respondents. The Order of this Court was therefore



contradictory to the earlier order of the Court of Appeal which allowed the implementation of the Finance Act 2023 in entirety. Further, the 3rd Respondent submits that the Supreme Court Order on 8th September 2023 had given the green light for the 3rd Respondent to continue to implement the provisions of the Finance Act, 2023 in entirety, which the impugned provisions herein are part of. From the foregoing, the alleged contemnors were left to resort to the rules of interpretation and apply the hierarchy of Courts and the latest order issued, which meant that it goes with the Court of Appeal direction of 28th July, 2023 and the Supreme Court order of 8th September, 2023. From the foregoing, it was the 3rd Respondent's submission that the orders of this Court could not be termed to be clear and unambiguous taking into account the circumstance of the implementation of the three conflicting orders hence they did not willfully and deliberately aim at disobeying the court's order.

Finding of the Court.

98. Taking into account the submissions by the applicant, the 2nd respondent and the explanation given by the alleged contemnors, to this court what was in issue was this court's court order dated 21.08.2023 but not any other order from any other court. The law is very clear. A party whom a court order is directed to by a competent court has no choice other than to first comply with the order, even if to the party the order is irregular or before taking any step, if not sure of the import of the court order, the party is supposed to rush back to court and explain its difficulties in complying with the particular court order but not to disregard the order and reread into the order meanings which were not intended by the order.
99. This court's order of 21.08.2023 was couched in very simple and straight English words such that no other meaning could have ascribed to the order other than stopping the 3rd respondent from implementing the provisions of Paragraph 4A Part II of the First Schedule to the [Excise Duty Act](#) 2015.
100. On the alleged contemnors' submission that avoiding of contempt cannot hold in view of change of circumstances in that new orders have been granted after the orders of 21.08.2023, I hold a different view. For what is initial is whether the orders of 21.08.2023 were breached or not. Unless the orders were varied or set aside, they were there to be complied with.
101. From the foregoing, it is my finding that failure by the alleged contemnors to abide by the court orders of 21.08.2023 was deliberate and thus the applicant has discharged his burden of proof to the satisfaction of this court.
102. Having found so, I therefore proceed and find that the alleged contemnors are in contempt of this court orders of 21.08.2023 and consequently cite them for contempt.
103. Considering the circumstances of this case and the material placed before the court, I am satisfied that the application is merited. Consequently, the notice of motions dated 04.09.2023 and 18.09.2023 are hereby allowed.
 - I. The Applicant's applications seeking to cite the contemnors for contempt of court dated 04.09.2023 and 18.09.2023 are hereby allowed and the Respondents are found to be in contempt of Court for disobeying the Court's orders of 21.08.2023.
 - II. The contemnors are hereby directed to purge their contempt within the next fourteen (14) days.
 - III. In default of compliance with order (b) above, a Notice to Show Cause will be issued against the contemnors to appear in person before the Court to show cause why they should not be committed to civil jail or fined.



- IV. The contemnors have no audience before this court, unless the contempt is purged therefore the contemnors application for review of the Court's orders dated 21.08.2023 is kept abeyance until such a time the contempt is purged or the conviction is set aside either on a review or appeal.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT KAKAMEGA THIS 21ST DAY OF NOVEMBER, 2024.

S.N MBUNGI

JUDGE

In the presence of:

Edward Okwama the petitioner present online

Mr. Limiso and Judith Kithinji for the 3rd respondent present

Mr. John Ochieng for the two alleged contemnors present

Mr. Mureithi for Level X Ltd present online

Mr. Mola holding brief for Mr. Ndolo for the 1st Respondent and also appearing for the 2nd Respondent present online.

Mr. Kiilu for the proposed 5th Respondent present online.

Mr. Kang'ethe holding brief for Mr. Simiyu for the 4th Respondent present online

No appearance for the Intended Interested Party/Applicant

Court Assistant – Fred Owegi

