



Bia Tosha Distributors Limited v Kenya Breweries Limited & 3 others; Cogno Ventures Limited (Interested Party) (Constitutional Petition 249 of 2016) [2024] KEHC 15737 (KLR) (Constitutional and Human Rights) (13 December 2024) (Ruling)

Neutral citation: [2024] KEHC 15737 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CONSTITUTIONAL AND HUMAN RIGHTS
CONSTITUTIONAL PETITION 249 OF 2016**

**EC MWITA, J
DECEMBER 13, 2024**

BETWEEN

BIA TOSHA DISTRIBUTORS LIMITED PETITIONER

AND

KENYA BREWERIES LIMITED 1ST RESPONDENT
UDV (KENYA) LIMITED 2ND RESPONDENT
EAST AFRICAN BREWERIES LIMITED 3RD RESPONDENT
DIAGEO PLC 4TH RESPONDENT

AND

COGNO VENTURES LIMITED INTERESTED PARTY

RULING

Introduction

1. This ruling disposes three applications namely; respondents’ applications dated 23rd February 2023 and petitioner’s application dated 8th March 2023. The applications dated 23rd February 2023 were filed on by Iseme Kamau & Maema Advocates on behalf of the 1st 3rd and 4th respondents and Oraro & Company Advocates on behalf of the 2nd respondent, respectively.
2. The 1st respondent’s application sought orders: that this court do clarify the orders made on 29th June 2016 (Onguto J) and in particular, to confirm that:



- a. the territories preserved by the court in favour of the petitioner are limited to Namanga, Bisil; Kajiado, Kitengela, Athi River, Industrial Area, South B, Nairobi West, Kenyatta, Langata, Rongai Kiserian Magadi, Upperhil, Ngong Road, Hurlingham, Kawangware, Stellite, Dagoretti, UDV A, UDV Band UDV Cand not any other area.
- b. The rights granted in the order relate to the distribution by the petitioner of the 1st respondent's products excluding keg beer.

In the alternative, the court be pleased to order that upon performance of the steps set out in the attached schedule, the applicants be deemed to have purged contempt.

3. The 2nd respondent's application sought almost similar orders as following-
 - ii. that there was no order granted against the applicant (2nd respondent) by the ruling of this court of 29th June 2016;
 - iii. this court be pleased to confirm the terms upon which the orders made by Justice J. L. Onguto on 29th June 2016 can be interpreted in order to purge the contempt as directed by the Supreme Court in its judgment dated 17th February 2023, as follows: -
 - a. As between the petitioner and the 1st respondent, the territories preserved by the court in favour of the petitioner are limited to Namanga, Bisil; Kajiado, Kitengela, Athi River, Industrial Area, South B, Nairobi West, Kenyatta, Langata, Rongai Kiserian Magadi, Upperhil, Ngong Road, Hurlingham, Kawangware, Stellite, Dagoretti, UDV A, UDV Band UDV Cand not any other area.
 - b. That the exclusive rights granted in those orders relate to the distribution by the petitioner of the 1st applicant's (respondent's) products, excluding Keg Beer and
 - c. That the exercise of the rights of distribution by the petitioner will be guided by the operational terms of the distribution agreement in force as of 2nd February, 2006 as renewed or amended from time to time.
4. The petitioner on its part, filed an application dated 8th March 2023 and sought an order expunging the respondents' applications dated 23rd February 2023 from the record and that the respondents be sanctioned for misconduct for appearing before this court in disobedience of the Supreme Court judgment which expressly denied them audience before this court other than for punishment for the contempt conviction for disobeying the status quo order by the Court of Appeal.

Background

5. On 14th June 2016 the petitioner filed a petition together with an application for conservatory orders. The petition was subsequently amended on 20th June 2016. On 29th June 2016, the Court (Onguto J) issued orders in the following terms:
 - a. pending the hearing and final determination of the petition herein a conservatory order will issue preserving the petitioner's Bia Tosha Territory exclusively to the petitioner under the area of operation arrangement obtaining as at 2nd February 2006.
 - b. The order herein above shall be applicable to the 1st respondent's products but shall not apply to product known as Keg Beer.
 - c. Each party shall bear its own costs of the application and is at liberty to apply.



6. Aggrieved, the 1st and 2nd respondents filed an appeal in the Court of Appeal (Civil Appeal No. 163 of 2016; Kenya Breweries Limited & another v Bia Tosha Limited & 5 others. They also sought stay of execution of the High Court orders pending the hearing and determination of that appeal. On 11th August 2016, the Court of Appeal ordered that status quo be maintained pending the hearing of that appeal.
7. Before the appeal could be heard, the petitioner filed an application dated 23rd August 2016 seeking to cite the 1st and 2nd respondents for contempt for violating the court orders. The 1st respondent also filed an application dated 7th December 2016 seeking to adduce additional evidence. A third application for joinder was filed by the Chartered Institute of Arbitrators.
8. In a ruling dated 30th May 2017, the Court of Appeal suspend all the pending applications. On 10th July 2020, the Court of Appeal delivered its judgment on the interlocutory appeal, set aside the conservatory orders issued on 29th June 2016 substituted then with an order staying the proceedings before the High Court pending the dispute being referred to arbitration and that the dispute between the 1st appellant and 1st respondent be referred to arbitration in accordance with the respective parties' distributorship agreements.
9. The petitioner filed an appeal against that judgment to the Supreme Court in Petition of Appeal No. 15 of 2020; Bia Tosha Distributors Limited v Kenya Breweries Limited & 6 others. On 17th February 2023, the Supreme Court delivered its judgment; allowed the appeal, set aside the judgment and orders of the Court of Appeal in entirety and reinstated the High Court orders of June 29, 2016.
10. The Supreme Court directed the High Court to consider the consequences of any disobedience of those orders and remitted the matter to the High Court for disposal of the amended petition on priority basis considering the age of the matter.
11. Thereafter, several applications were filed in the Supreme Court seeking clarification of its judgment. In its ruling dated 26th May 2023, the Supreme Court clarified and emphasized what it had said in its judgment of 17th February 2023.

Respondents' applications dated 23rd February 2023 (by 1^s and 2nd respondents)

12. As reproduced above, these applications sought this court's clarification of the orders made on 29th June 2016, in particular, regarding the territories preserved by the court in favour of the petitioner and whether the rights granted in the orders related to the distribution by the petitioner of the 1st respondent's products, excluding Keg Beer.
13. The applications are premised on the grounds that, on 17th February 2023, the Supreme Court delivered a judgment in Petition No. 15 of 2020 reinstating this court's orders made on 29th June 2016. That a disagreement had arisen between the respondents and the petitioner regarding the territories preserved in favour of the petitioner and the manner of execution of those orders. They also stated that the petitioner had further rejected all pleas to meet with them for purposes of resolving the disagreement and had threatened to undertake adverse actions against them.
14. They asserted that the 1st respondent is a public company with over 20,000 local shareholders and risks loss of business thus, there was urgent need for the court to clarify the orders.
15. The 1st interested party filed an affidavit in support of these application. The 1st interested party reiterated that the Supreme Court set aside the judgment and orders of the Court of Appeal and reinstated the conservatory orders issued by the High Court on 29th June 2016.



16. According to the 1st interested party, through a distribution agreement dated 13th October 2006 and subsequently extended on 1st October 2013 and 3rd June 2016, the 1st respondent granted the petitioner territory rights on a non-exclusive basis to distribute and sell the 1st respondent's products in Namanga, Bissil, Kajiado, Kitengela, Athi River, Industrial Area, South B, Nairobi West, Kenyatta, Langata, Rongai, Kiserian, Magadi, Upperhill, Ngong Road, Hurlingham, Kawangware, Satellite, Dagoretti, UDV A, UDV B and UDV C at a non-refundable commitment fee of Kshs. 27,300,000. The 1st respondent however reserved its right to appoint other distributors or stockists in the territory to sell and supply its products.
17. Through a Keg Distribution agreement dated 1st December 2012 and subsequently renewed on 1st May 2016, the 1st respondent granted the 1st interested party territory rights on a non-exclusive basis to distribute the 1st respondent's products on various routes, including Nairobi West Langata, Ngong Road, Kenyatta Market, Dagoretti, Racecourse, Karen and Kibera some of which routes are shared with the petitioner. The 1st respondent again reserved the right to appoint other distributors in the territory.
18. The 1st interested party took the position that under the said distribution agreement, the 1st respondent's products were defined to mean such imported and domestic branded beer, Kegs, lager and /or stout products and/ or any others branded product of the company.
19. The 1st interested party had to date continued to distribute and resell the 1st respondent's products, not limited to Keg, along those routes which also fall within shared territory with the petitioner.
20. The 1st interested party argued that in view of the foregoing, and the fact that the petitioner and the 1st interested party have territory rights on a non-exclusive basis for distribution of the 1st respondent's products, it is proper that the court urgently clarified its conservatory orders.

Petitioner's response

21. The petitioner opposed the two applications through grounds of opposition, contending that the respondents were guilty of non-disclosure of material facts and that the applications had been filed in defiance of an express order of the Supreme Court and ought to be expunged from the record.
22. According to the petitioner, the respondents had been convicted by the Supreme Court for disobeying the status quo orders issued by the Court of Appeal and had been remanded to appear before this Court for punishment and purging of their contempt.
23. The petitioner maintained that this court is bound by the Supreme Court judgment and cannot allow the respondents audience to file any application to challenge their conviction; to urge for review of their conviction or to seek clarification of any orders on the judgment of the Supreme Court. The petitioner contention therefore that the applications offend the doctrine of stare decisis and are appeals disguised as applications.

Submissions on behalf of 1st respondent

24. Mr. Kamau Karori, SC for the 1st respondent relied on sections 3A, 29 and 34 of the *Civil Procedure Act* and several decisions, including Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others [2014] eKLR; Kimani Gachuhi & another v Evangelical Mission for Africa & another [2018] eKLR; Swift Energy Distributors Gas Limited v Energy and Petroleum Regulatory Authority & another; Abdi Ali Mohamed (Interested Party) [2020] eKLR, to argue that this court has jurisdiction to clarify its own orders.



25. Senior Counsel urged this court to allow the application as it was necessary because of the divergent interpretations as to the manner and scope of the court orders. He also relied on the decision in *Bumasutra Savings and Credit Co-operative Society Ltd v County Government of Nakuru* [2016] eKLR to support their position.
26. Mr. Karori, S C. maintained that the 1st respondent's application is properly before this court and is not an appeal against the orders of 29th June 2016 or judgment of the Supreme Court. He relied on several decisions, including *Chalicha F.C.S Ltd v Odhiambo & 9 others* [1987] KLR 182 and *Law Society of Kenya v Hillary Mutyambai Inspector General National Police Service & 4 others*; *Kenya National Commission on Human Rights & 3 others (Interested Parties)* [2020] eKLR.

Submissions on behalf of the 2nd respondent

27. Mr. Oraro, SC. submitted in favour of granting the 2nd respondent's application. He relied on the decision in *Nairobi Hospital Insurance Fund Board of Management v Boya Rural Nursing Home Limited* [2007] eKLR for the argument that the 2nd respondent is entitled to make the application because it wishes to purge contempt, if any. Further the 2nd respondent has a right to be heard in the application to purge contempt which right is enshrined in articles 25 and 50 of *the constitution*, section 34 of the *Civil Procedure Act* and was acknowledged at paragraphs 129, 130 and 134 of the Supreme Court judgment.
28. Senior Counsel again relied on the Commentary on Disobedience of Orders, Halsbury's Laws of England 4th Edition Volume 9 to argue that no orders were issued against it on 29th June 2016 and the petitioner had not identified such an order.
29. According to Mr. Oraro, SC. the 2nd respondent can only be liable for punishment for contempt if it is proved that it is in breach of the court orders which orders should show on the face the nature of the contempt to enable the contemnor purge its contempt.

1st interested party's submissions

30. Mr. Issa argued on behalf of the 1st Interested party that this court has jurisdiction to clarify its own orders and relied on *Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others* (supra) and *Swift Energy Distributors Gas Limited v Energy and Petroleum Regulatory Authority & Another; Abdi Ali Mohamed (Interested Party)* (supra.)
31. Counsel took the same view as the 1st and 2nd respondents that in view of the petitioner's letters dated 11th February 2023 and 19th February 2023 containing the interpretation of the court order of 29th June 2016, there is need for this court to clarify its orders with regard to the specific territories preserved for the petitioner and the nature of the rights exclusivity granted to the petitioner.
32. Mr. Issa asserted that while the petitioner's letter dated 19th February 2023 contended that its territory and routes include Nairobi and its environs, it is the 22 routes identified in its application dated 14th June 2016 that were alluded to by the order of the court as affirmed by the Supreme Court.
33. Further that despite the order being clear that the conservatory orders is only applicable to the 1st respondents products but shall not apply to Keg Beer, the petitioner sought to have the 1st and 2nd respondents stop all distribution of their products which would negatively impact the 1st Interested party. It is in public interest to confirm the extent of the exclusive rights in view of section 21(3) of the *Competition Act*.



Petitioner's application

34. The petitioner's application sought to have the respondents' expunged from the record and the respondents to be sanctioned for misconduct for appearing before this court in disobedience of the Supreme Court judgment.
35. According to the petitioner, the Supreme Court in its judgment of 17th February 2023 found the 1st and 2nd respondents guilty of contempt for disobeying the orders of the Court of Appeal. Flowing from that conviction, the Supreme Court directed this Court to issue suitable punishment for contempt on priority basis as it deals with the petition pending before it on its merits.
36. It is the petitioner's position that the Supreme Court directed that the respondents can only appear before this Court to purge the contempt before they can be allowed audience. The respondents' applications thus, offend the orders of the Supreme Court and the doctrine of stare decisis.

1st respondent's response

37. The 1st respondent opposed this application through a replying affidavit. The 1st respondent substantially reiterated the contents of its own application dated 23rd February 2023. The 1st respondent contended that the petitioner is in contempt as it had not taken any steps to comply with the Supreme Court order that the petition be heard on priority.
38. The 1st respondent denied that it had asked this court to sit on appeal over the Supreme Court's judgment or interpret what the Supreme Court had said in that judgment. The 1st respondent maintained that its application is intended to ensure full compliance with the conservatory orders and the findings by the Supreme Court in its judgment.
39. The 1st respondent argued that contrary to the petitioner's assertions that the Supreme Court finding was on contempt with regard to the Court of Appeal status quo orders, the Supreme Court's focus was on the contempt application pending before this court. According to the 1st respondent, the conservatory orders issued by this court on 29th June 2016 gave rise to the Court of Appeal status quo order and the contempt of court application dated 23rd August 2016.
40. The 1st respondent again argued that contrary to the petitioner's assertions that they (respondents) had no audience before this court except to appear before this court for punishment, the Supreme Court's judgment is that their (respondents') right of audience before this court is limited to appearing court to purge any contempt and not for punishment as alleged.
41. The 1st respondent enumerates the actions it had taken with a view of purging any contempt and ensuring compliance with the conservatory orders and the judgment. It asserted that while obedience of courts orders is one of the tenets of the rule of law, where for good reason a party finds that it needs the court's clarification of its orders for the purposes of ensuring full compliance, the party has a right to seeks such clarification from the court.

2nd respondent's response

42. The 2nd respondent also opposed this application through a replying affidavit. The 2nd respondent contended that it made its application following the Supreme Court's finding and directions that it purges contempt. According to the 2nd respondent, the orders of 29th June 2016 were only applicable to the 1st respondent's products excluding Keg beer and the court found that the petitioner's claim with regard to good will would only stand in good stead against and in relation to the 1st respondent.



43. The 2nd respondent took the view, that the petitioner's application dated 23rd August 2016 for contempt did not identify how it (2nd respondent) violated the orders of 29th June 2016. The 2nd respondent maintained that its application did not seek to challenge or a review the judgment of the Supreme Court, but only sought this court's confirmation on the terms upon which it (2nd respondent) could purge the contempt.
44. The 2nd respondent contended that although the Supreme Court found the 1st and 2nd respondents liable for contempt of the orders of 29th June 2016, it left it to this court to consider the consequences of any disobedience of those orders. It is for that purpose that it (2nd respondent) had applied to ascertain the nature of any disobedience of those orders and the consequences arising therefrom.
45. The 2nd respondent maintained that under section 34 of the Civil Procedure Act, all questions regarding the execution, discharge or satisfaction of a decree or order have to be determined by the court executing the decree or order, which in the present proceedings, is this court. The application should therefore be dismissed.

Submissions on behalf of the Petitioner

46. Dr. Kiplagat, Counsel for the petitioner, relied on section 2 of the Civil Procedure Act and the decision in *Benson v Benson* [1941] p. 90 to submit that while the respondents say that this court must be guided only by what the extracted decree proclaims and may not look at the judgment of the Supreme Court for what it has directed this court to do, article 163(7) of the constitution does not stipulate that lower courts can only obey decrees of the Supreme Court.
47. Counsel argued that the Supreme Court had not asked this court to investigate whether the respondents were guilty of contempt or not. It directed this Court to punish for contempt before doing anything else. This court has no jurisdiction to challenge the conviction decision of the Supreme Court.
48. Dr. Kiplagat urged that the Supreme Court directed this Court to determine the quantum for special damages resulting from contempt conviction. The contempt application is yet to be heard and it therefore cannot be compromised by the respondents' applications without being heard on the merits.
49. Counsel took the view, that summons had been taken out for the respondents to appear as directed by the Supreme Court and the petitioner had also tabled losses resulting from the contempt and sought damages in compensation. He relied on Doug R. Reddeman, *Compensatory Contempt: Plaintiff's Remedy When a Defendant Violates an Injunction*, Law Forum [Vol. 1980] at page 971.
50. Dr. Kiplagat argued that the twin proceedings for punishing the respondents and determining damages resulting from the contempt conviction are mandatory pre-requisites to the matter herein proceedings to hearing. He maintained that the Supreme Court was dealing with the contempt application that was pending before the Court of Appeal and found the respondents guilty of contempt. This court has no jurisdiction to interpret the judgment of the Supreme Court.
51. According to Dr. Kiplagat, the petition is structured around the good will paid by the petitioner to the respondents on 2nd February 2006 thus, the decision by Onguto J was not crafted from the pleadings of the parties but was a sui generis order extracted from the appreciation of facts and submissions before him.
52. Counsel relied on *Belle Mason v Yaya Centre HCC 225 of 1992* and *Ripples Ltd v Kamau Mucuha* [1992] eKLR for the argument that a contemnor cannot benefit from breach of the court order. The petitioner is entitled to damages as a result of the continued contempt by the respondents which has occasioned massive losses.



Submissions on behalf of the 1st respondent

53. Mr. Kamau Karori, SC counsel for the 1st respondent, submitted that there was no order in the decree directing this court to deny the 1st respondent audience. This court is required to enquire into and issue appropriate punishment if there was disobedience of the order of 29th June 2016 from the date they were reinstated by the Supreme Court and to immediately hear the parties in respect to the amended petition.
54. Senior Counsel argued that the executable orders of a court are those contained in the decree issued by the issuing court. Thus, the expression of the decision by the Supreme Court and which this court is required to enforce is contained in the decree issued on 21st March 2023. He relied on section 2 of the *Civil Procedure Act* and the decisions in Anthony Muli Nzioka v Attorney General [2020] eKLR; Rubo Kimngetich Arap Cheruiyot v Peter Kiprop Rotich [2006] eKLR and Vasudev v Dhanjibhai Rehman & Ors 1970 AIR 1475, 1971 SCR (1) 66.
55. Mr. Karori, SC maintained that the 1st respondent has audience before this court and that the petitioner's counsel had misunderstood the law relating to access to a court of law by a contemnor. He again relied on A.B & another v R.B [2016] eKLR; National Hospital Insurance Fund Board of Management v Boya Rural Nursing Home Ltd [2007] KECA 436 (KLR) and Akber Abdullah Kassam Esmail v Equip Agencies Ltd & 4 others [2014] eKLR.
56. He maintained that this court is enjoined to hear the application for clarification for the purpose of providing the clarity sought and that the 1st respondent's application is properly before court given the divergent positions taken by parties. He took the view, that there was no order by the Supreme Court either in the body of the judgment or decree directing this court to determine quantum on special damages.

Submissions on behalf of the 2nd respondent

57. Mr. Oraro, SC submitted on behalf of the 2nd respondent that the Supreme Court had allowed audience before this court for the purposes of purging contempt which can only be done under Order 51 of the Civil Procedure Rules or rule 24 of the Mutunga Rules. The Supreme Court order was also consistent with articles 25 and 50 of *the constitution* and the accepted principles with regard to contempt.
58. Senior Counsel argued that the Supreme Court judgment speaks for itself and having set out the reliefs on the basis of the reasons given, it formed executable part of the Supreme Court judgment. He relied on the decision in Madan Mohan v State of Rajasthan & others AIR 2017 SC 5848 that the effect of the Supreme Court order was to order the High Court to consider the consequence of any disobedience of the conservatory orders granted on 29th June 2016.
59. Mr. Oraro, SC argued therefore, that the starting point was the nature of the conservatory orders granted on 29th June 2016 and whether there was any disobedience of those orders by the 2nd respondent. On determining this issue, consequences of any disobedience would arise. To proceed to punish the 1st and 2nd respondents without determining the nature of disobedience would go against the Supreme Court judgment and articles 25 and 50 of *the constitution*. He relied on Alridge, Eady & Smith on Contempt, 2nd Edition Paragraph 12-61, page 751 and National Hospital Insurance Fund Board of Management v Boya Rural Nursing Home Limited (supra).



60. Senior Counsel again relied on *Re: L (A child)* [2016] EWCA Civ 173 to reiterate that the petitioner had failed to identify which of the orders granted on 29th June 2016 was directed to the 2nd respondent. He again argued that the Supreme Court neither directed nor made an order for compensation.
61. He again relied on *Republic v Ahmed Abdolfadhi Mohammed & Another* [2018] eKLR for the position that punishment for contempt is for maintenance of the rule of law and to uphold the dignity of the court.
62. Regarding the contempt application before this Court, he argued, the Supreme Court found that the contempt application filed in this Court on 23rd August 2016 arose from the status quo order made by the Court of Appeal on 11th August 2016. It was from that application that the Supreme Court came to the conclusion to assess the suitable punishment arising out of that contempt application and directed this court to consider the consequences of any disobedience of those orders.
63. Mr. Oraro, SC. contended that the 2nd respondent's application did not seek to challenge, review or countermand the Supreme Court judgment but is for confirmation of the terms upon which the conservatory orders made on 29th June 2016 could be implemented in order to purge contempt on its part.

Submissions on behalf of the 1st interested party

64. Mr Issa argued on behalf of the 1st interested party that this court has jurisdiction to clarify its own orders. He relied on *Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others* [2014] eKLR and *Swift Energy Distributors Gas Limited v Energy and Petroleum Regulatory Authority & Another; Abdi Ali Mohamed (Interested Party) supra and Salima Hirsi v Kinoti Imanyara & 2 others* [2009] eKLR.
65. Counsel argued that the respondents' applications only sought clarification of the conservatory orders issued on 29th June 2016 and did not offend the doctrine of stare decisis. Reliance was placed on article 163 (7) of *the constitution* and the decisions in *Koinange v Commission of Inquiry Into The Goldenberg Affair* [2006] eKLR and *Blue Shield Insurance Company Ltd v Joseph Mboya Oguttu* [2009] eKLR.

Determination

66. I have considered the three applications and arguments by counsel for the parties. As pointed out earlier in this ruling, the applications by the respondents seek, in the main, what the respondents contend is clarifications of the orders issue on 29th June 2016 on the extent of the territory reserved for the petitioner and confirmation of the routes.
67. On the other hand, the application by the petitioner is straight forward. It seeks to have the two applications by the respondents expunged from the record as, in the applicant's view, they go against the orders and directions of the Supreme Court issued on 17th February 2023.
68. From these applications and the elaborate arguments by counsel for the parties, the issue for determination is which application stands out for granting; The respondents' applications or that of the petitioner which, in my view, is a response to the respondents' applications.
69. To answer the issue presented before this court in the three applications, the starting point must be the judgment of the Supreme Court delivered on 17th February 2023 in order to understand the extent of this court's remit with regard to the matteRs raised in the applications.



70. Before the Supreme Court was an appeal against the judgment of the Court of Appeal in which the Court of Appeal had set aside orders of the High Court issued on 29th June 2016 for conservatory orders. The Supreme Court allowed the appeal filed by the petitioner against the judgment of the Court of Appeal in its entirety. The Supreme Court reinstated the orders issued by the High court on 29th June 2016 and directed this court to consider the consequences of any disobedience of those orders. The Supreme Court further remitted the matter to this court for disposal of the amended petition on priority basis considering the age of the matter.
71. Before making those final orders, the Supreme court observed at paragraph 128 of its judgment that flowing from what it had stated at paragraph 127, there was breach of the status quo order which was manifest from the 1st and 2nd respondents' attempt to terminate the contract with the respondent (petitioner) or otherwise interfere with the said routes as revealed in the position on record taken by the respondents.
72. The Supreme Court then stated at paragraph 129, that having overturned the Court of Appeal Judgment and having established that there was contempt of court, the same should not go unpunished. The Supreme court then stated at paragraph 130:
- [130] For these reasons we direct the High Court to, on the basis of our finding on contempt, issue suitable punishment for contempt of court on priority basis as it deals with the petition pending before it on its merits. We note that there is a pending application for contempt before the High Court for contempt arising out of what we have now set out to be the status quo. The said respondents can only appear at this stage before the High Court to purge the contempt before they can be allowed audience before the Court, now seized of the matter. (emphasis)
73. The Supreme court then stated at paragraph 131 that the orders of the High Court made on 29th June 2016 were fully restored to enable the court resume the hearing on merit of the amended petition pending before it, and added that: "Having found that there was contempt of court, the High Court should also proceed to assess the suitable punishment arising out of the contempt application dated 23rd August 2016 by the appellant pending before it."
74. The applications dated 23rd February 2023, in essence sought this court's interpretation of what the order of 29th June 2016 meant and confirm the routes that had been reserved for the petitioner were those mentioned in the applications and orders sought. They also wanted this court to affirm that the distribution did not extend to Keg Beer for purposes of their compliance and purging of contempt.
75. I have anxiously read the applications by the respondents and the lengthy arguments made on their behalf in support of those applications. Having perused the judgment of the Supreme Court and the directions therein, the view I take, is that what the respondents' applications seek from this court is for it to revisit a matter that is closed. The Supreme court was categorical that the 1st and 2nd respondents had committed contempt of the status quo orders and remitted to this court only the issue of considering the suitable punishment. In doing so, the Supreme Court directed this court, on the basis of its finding on contempt, to issue suitable punishment for the contempt of court on priority basis as it deals with the petition pending before it on its merits.
76. The Supreme court made it plain that "the respondents can only appear at this stage before the High Court to purge the contempt before they can be allowed audience before the Court, now seized of the matter." In other words, the Supreme Court limited what the respondents can appear and do before this court- to purge the contempt and for punishment. That is the extent of the remit of this court flowing from the judgment, orders and directions of the supreme Court.



77. A careful reading of the applications and arguments made on behalf the respondents show that they want this court to go back to issues that are not before it now, such as the routes that were the subject of the orders; that the orders did not concern some or one of the parties and the like. There is even an argument that there was no contempt with regard to the 2nd respondent and that no orders were made against it by the High Court.
78. This is clear from the submissions made on behalf of the 2nd respondent that it can only be liable for punishment for contempt if it is proved that it is in breach of the court orders which orders should show on the face, the nature of the contempt to enable the contemnor purge its contempt. This submission was made notwithstanding the firm finding by Supreme Court in its judgment that there was contempt.
79. This Court must make it clear that it is bound by the decision and directions of the Supreme Court on the extent of the issues it can deal with arising from those directions. It cannot purport to expand its mandate beyond those directions. Similarly, the respondents are aware of what they can do or not do before this Court at this stage with regard to the finding of contempt against them by the Supreme Court.
80. Regarding the respondents' argument that they need the clarification sought to enable them purge contempt, it is not available to this court to clarify orders that have already been breached and the breach thereof confirmed by the Supreme Court. This Court would be acting outside the directions of the Supreme Court that the respondents can only appear at this stage before this Court to purge the contempt before they can be allowed audience by the Court, now seized of the matter. That is; the respondents have no other audience than to purge contempt and for appropriate punishment.
81. It was argued on behalf of the 2nd respondent, relying on the decision of the Supreme Court of India in *Madan Mohan v State of Rajasthan & others* AIR SC 5848, that a superior court should not direct a lower court on how to deal with a matter.
34. In that decision, the Supreme Court of India cautioned that a superior court in hierarchical jurisdiction should not issue directions/mandamus to subordinate courts commanding them to pass a particular order on any application filed by any party in order to guard judicial independence of every court to passing orders in cases before them and not to appear to interfere with such independence.
34. The court observed that when such an order is passed, it can be questioned by the aggrieved party in an appeal or revision, as the case may be, to the Superior Court. It is then for the Appellate/or Revisionary Court to decide as to what orders need to be passed in exercise of its Appellate/Revisionary jurisdiction.
41. The court stated that "Even while remanding the case to the subordinate Court, the Superior Court cannot issue a direction to the subordinate Court to either "allow" the case or "reject" it. If any such directions are issued, it would amount to usurping the powers of that Court and would amount to interfering in the discretionary powers of the subordinate Court. Such order is, therefore, not legally sustainable."
41. The principle in that decision is distinguishable from the circumstances obtaining in these applications. In the Indian case, the superior court had directed the subordinate court to allow an application for bail. The Supreme Court frowned upon such an order since allowing bail or not was an issue that depended on the discretion of the subordinate court to apply its independent judicial mind and pass an appropriate and reasoned order, keeping in mind the facts involved in the case and the legal principles applicable for granting or declining bail.



82. In these applications, the Supreme Court found that the respondents had committed contempt and only remitted the matter to this court for appropriate punishment as this court has authority and power to execute orders of the Supreme Court and since an application for contempt filed before this court was pending.
83. In the circumstances, having carefully considered the applications, arguments by counsel for the parties and perused the judgment of the Supreme Court dated 17th February 2023, I agree with the petitioner that the respondents have no any other audience before this court other than to appear and purge the contempt and for this court to consider appropriate punishment.
84. Consequently, and for the above reasons, the 1st and 2nd respondents' applications dated 23rd February 2023 are hereby struck out with costs to the petitioner. I do not think there would be need to make any other orders regarding the petitioner's application.

DATED AND DELIVERED AT NAIROBI THIS 13TH DAY OF DECEMBER 2024

E C MWITA

JUDGE

