



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT AT NAIROBI

PETITION NO. E033 OF 2021

IN THE MATTER OF APPLICATION FOR CONTEMPT/DISOBEDIENCE OF COURT ORDERS GIVEN IN THIS MATTER ON 17/09/2021 BY THE CONTEMNORS HEREUNDER IN KIPSIRGOI INVESTMENT LIMITED

KIPSIRGOI INVESTMENTS LIMITED.....PETITIONER

VERSUS

LOCAL AUTHORITIES PENSION TRUST

REGISTERED TRUSTEES.....RESPONDENT

NATIONAL ENVIRONMENT

MANAGEMENT AUTHORITY INTERESTED PARTY

EX-PARTE

1. DR. GEORGE KWENDO

2. HOSEA KILI

3. JULIUS KORIR

4. MATILDA KIMETTO

5. JOHN OSCAR JUMA

6. PETER MUSA KITESHO

7. LUCY MUNJUGA

8. JOSEPH KABERIA 1.A., MBS (JP)

9. WINFRED SYOMBUA

(Being REGISTERED TRUSTEES OF LOCAL

AUTHORITIES PENSION TRUST).....CONTEMNORS

RULING(2)

1. In the Notice of Motion dated 29th September, 2021, the Plaintiff has prayed for the following orders:

a) *That this Honourable court be pleased to order the following persons named below being the Registered Trustees of the Respondent herein be and are hereby condemned to pay a fine, be committed to civil jail or both for contempt/disobedience of the orders given on 17/09/2021 by (Hon. Justice Mr. O. Angote) of the Environment & Land Court of Kenya at Nairobi in ELC Petition No. E033 of 2021:*

(i) Dr. George Kwendo

(ii) Hosea Kili

(iii) Julius Korir

(iv) Matilda Kimetto

(v) John Oscar Juma

(vi) Peter Musa Kitesho

(vii) Lucy Munjuga

(viii) Joseph Kaberia 1.A., MBS (JP)

(ix) Winfred Syombua

b) That the officer in charge Karen Police Station do ensure maintenance of law and order in enforcement of the order of this court given on 17/09/2021.

c) That the Respondent do pay costs of this Application.

2. The Application is supported by the Affidavit of the Petitioner's Director who deponed that on 13th September, 2021, he lodged a Petition in this court for violation of the Petitioner's right to a clean and healthy environment as well as the right to property under **Articles 40, 42, 69 and 70** of the **Constitution** and that on 17th September, 2021, this Court granted to the Petitioner a temporary conservatory order restraining the Respondent by itself or agents from carrying out construction or road works on the Petitioner's property known as L. R. No. 13065.

3. According to the Petitioner's Director, despite the issuance of the said order, which was served on the Respondent by email on 17th September, 2021 at 1500 hours, the cited contemnors directed the Respondent on 22nd, 23rd, 24th, 25th and 28th September, 2021, to continue with the road works on the suit property by delivering sand, cabro and heavy machinery which levelled the concrete stones spread over the road.

4. The Petitioner's Director further deponed that under the instructions of the cited contemnors, and despite the order of the court, the contractor laid cabro and drainage trenches on the sides of the impugned road and that they are currently past 95% completing the restrained works in open and deliberate disobedience of the orders of the court.

5. The Respondent and the alleged contemnors filed a Notice of Preliminary Objection in which they averred that the certificate of authenticity of electronic record annexed on the Application does not meet the statutory requirements for purposes of **Section 106B** of the **Evidence Act**.

6. The Respondent and the alleged contemnors further averred that the certificate of the electronic record was not signed by the person in relation to the operation of the relevant device; that there is no identification of the electronic record containing the statement and describing the manner in which it was procured and that the particulars of the device involved in the production of the electronic record for purposes of showing that the electronic record was produced by a computer has not been produced.

7. In his Further Affidavit, the Petitioner's Director deponed that despite being served with injunctive orders, the Respondent, through its Registered Trustees and other officers working under them continued with the road works on the suit property particularly laying of cabro on the road in deliberate and open disobedience of the orders of this court, particularly on Saturday, 2nd October, 2021 and Monday, 4th October, 2021.

8. The Petitioner's Director deponed that she took pictures of the road works and laying of cabro on the impugned road on Saturday 2nd October, 2021 at about 12 O'clock and also took a picture of the court order dated 17th September, 2021 pinned at the entrance of the suit property and that the Respondent's employees informed him that the orders of the court had lapsed on 30th September, 2021, hence the reason for doing the works.

9. In his submissions, the Petitioner's advocate submitted that despite being served with the order of the court dated 17th September, 2021 with a penal notice, the Respondent's agents continued with the acts of trespass; that the order of this court was clear that the Respondent should not undertake any construction on the impugned road and that the Respondent had knowledge of the order.

10. It was submitted that there is no affidavit on record by the Respondent disputing the facts presented in the Petitioner's affidavit and that the certificate of accuracy produced by the Petitioner is admissible as the same is in compliant with **Section 106B** of the **Evidence Act**.

11. Counsel submitted that the photographs of the impugned actions of the Respondent were taken by the Petitioner's Director vide her cell phone, who then sent them to his cell phone and that he (the Advocate) printed them and swore an Affidavit and a certificate of accuracy. It was submitted that a mobile phone is an electronic device contemplated under **Section 106B** of the **Evidence Act**.

12. On his part, the Respondent's advocate submitted that the certificates provided by the Petitioner do not satisfy the statutory requirement of **Section 106B** of the **Evidence Act** because they were signed by the wrong person; that the person referred to in **Section 106B** is the person who took the initial pictures and that the certificates should have been done by Maureen Cheptoo Leting having alleged that she took the pictures.

13. Counsel for the Respondent submitted that the certificates do not provide particulars of the device that was used to produce the photographs and that the deponents of the certificates do not make any pronouncements on the working condition of the Petitioner's Director's cell phone.

14. Counsel submitted that the manner in which the photos were transmitted to the producing device are not provided; that **section 106B (3)** of the **Evidence Act** provides for instances where more than one computer is used and that all the computers used in the taking of the photographs ought to have met the requirements of **Section 106B (4)** of the Act. The Respondent's counsel finally submitted that contempt proceedings are quasi criminal in nature and as such must be handled from a near criminal perspective.

15. The only issue for determination is whether this court should commit the alleged contemnors for contempt of the court orders that were issued on 17th September, 2021.

16. The grounds to be proved in contempt proceedings, according to **G. Bonnie and N. Lowe, "The Law of Contempt" 4th Edition, London Butterworth's, 2010, P.129** are:

a) The terms of the order (or injunction or undertaking) were clear and unambiguous and were binding the Respondent;

b) The Respondent had knowledge of a proper notice of the terms of the order;

c) The Respondent has acted in breach of the terms of the order; and

d) The Respondent's conduct was deliberate.

17. Contempt of court has been defined as conduct which interferes with the administration of justice or impedes or perverts the course of justice. Civil contempt consists of a failure to comply with a judgment or order of a court or breach of an undertaking of court. (See *Osborne's Concise Law Dictionary*).

18. In the case of ***Sam Nyamweya & Others vs. Kenya Premier League Ltd and Others [2015] eKLR*** Aburili J stated as follows:

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

19. **Halsbury's Laws of England, Vol.9 (1) 4th Edition** provides as follows:

"Contempt of Court can be classified as either criminal contempt, consisting of words or acts which impede or interfere with the administration of justice or which creates substantial risk that the course of justice will be seriously impeded or prejudiced, or contempt in procedure, otherwise known as civil contempt consisting of disobedience to Judgment, Orders or other process of Court and involving in private injury."

20. The elements of civil contempt were laid out by the Law Commission of New Zealand in 'Contempt in Modern New Zealand' that was cited in ***North Tetu Farmers Co. Ltd vs Joseph Nderitu Wanjohi [2016] eKLR*** as follows:

"There are essentially four elements that must be proved to make the case for civil contempt. The applicant must prove to the required standard (in civil contempt cases which is higher than civil cases) that:

(a) the terms of the order (or injunction or undertaking) were clear and unambiguous and were binding on the Defendant;

(b) the defendant had knowledge of or proper notice of the terms of the order;

(c) the defendant has acted in breach of the terms of the order; and

(d) the defendant's conduct was deliberate."

21. As was held in the case of ***Katsuri Limited vs. Kapurchand Depar Shah [2016] eKLR***, where the liberty of the subject is or might be involved, the breach for which the alleged contemnor is cited must be precisely defined and proved. The court went further to hold as follows:

"A contempt of court is an offence of a criminal character. A man may be sent to prison. It must be satisfactory proved. It must be higher than proof on a balance of probabilities, almost, but not exactly, beyond reasonable doubt. The standard of proof beyond reasonable doubt ought to be left where it belongs, to wit, in criminal cases. It is not safe to extend it to contempt."

22. It is not in dispute that on 17th September, 2021, this court granted a temporary conservatory order of injunction stopping the Respondent whether by itself or agents, contractors or anyone claiming under it from proceeding with or carrying out deleterious and destructive activities, particularly cutting down, wasting away and destroying tress or any property, excavating or carrying out construction or road works including but not limited to purported upgrading or constructing a 10 meter wide road on the Petitioner's land LR No. 13065 (original number 6939/1 and 5830/9) situate in Ololua Ridge Karen in Nairobi until 30th September, 2021.

23. According to the Affidavit of service, the Respondent was served with the order of 17th September, 2021 on the same day the order was issued by this court. It has been deponed by the Petitioner's Director that on 18th September, 2021, the said court order was placed in a conspicuous place at the two entry points into the Petitioner's land whereon the Respondent had erected gates.

24. According to the Petitioner's Director, despite the issuance of the said order, which was served on the Respondent by email on 17th September, 2021 at 1500 hours, the cited contemnors directed the Respondent on 22nd, 23rd, 24th, 25th and 28th September, 2021, to continue with the road works on the suit property by delivering sand, cabro and heavy machinery which levelled the concrete stones spread over the road.

25. The Petitioner's Director further deponed that under the instructions of the cited contemnors, and despite the order of the court, the contractor laid cabro and drainage trenches on the sides of the impugned road and that they are currently past 95% completing the restrained works in open and deliberate disobedience of the orders of the court.

26. To prove his case, the Petitioner's Director annexed on her Affidavit several undated photographs. The photographs show the ongoing construction, including heavy machinery, stones, cabro, sand and people who appear to be laying cabro on a road. The first batch of photographs, according to the Petitioner's Director, shows the works by the Respondent's contractors and workers on 23rd September, 2021 on LR No. 13065.

27. The second batch of photographs, according to the Petitioner's Director, are the works that were being undertaken by the Respondent's employees on the suit property on 25th September, 2021. The alleged contemnors did not file an affidavit to dispute the allegations that indeed they were served with the orders of this court on 17th September, 2021 and that despite being served, they instructed their agents to continue with the construction works on 23rd September, 2021 and 25th September, 2021.

28. Instead, the Respondent and the alleged contemnors filed a Notice of Preliminary Objection in which they argued that that the certificates provided by the Petitioner do not satisfy the statutory requirement of **Section 106B** of the **Evidence Act** because they were signed by the wrong person; that the person referred to in **Section 106B** is the person who took the initial pictures and that the certificates should have been done by Maureen Cheptoo Leting having alleged that she took the pictures.

29. Counsel for the Respondent submitted that the certificates do not provide particulars of the device used to produce the photographs and that the deponents of the certificates do not make any pronouncements on the working condition of the Petitioner's Director's cell phone.

30. I have read the Certificate of Authenticity of Electronic Evidence sworn by the Petitioner's advocate, Oscar Litoro. In the said Certificate, the said Oscar Litoro has stated as follows:

"2. THAT on diverse dates between 22nd, 23rd, 24th, 27th and 28th September, 2021, I received photographic evidence of excavators and road construction works on the property known as LR. No. 13065 in Karen Nairobi from the Petitioners Directors vide her cell phone to my cell phone number 0720870983 which I printed the said photographs and designated them by date of receipt for production in the above court case and confirm that the Computer was operating properly without any interference to the photos or computer."

31. The Applicable law as regards admissibility of electronic evidence is the Evidence Act, which in **section 2** provides for its applicability as follows:

"(1) This Act shall apply to all judicial proceedings in or before any court other than a Kadhi's court, but not to proceedings before an arbitrator.

(2) Subject to the provisions of any other Act or of any rules of court, this Act shall apply to affidavits presented to any court."

32. The provisions of the Evidence Act therefore apply to all judicial proceedings, be they criminal or civil proceedings. The only exception are proceedings in Kadhi's Court where Islamic law applies. That being the case, it is my finding that the Evidence Act also applies to affidavit evidence adduced in court.

33. As regards admissibility of electronic evidence, **section 78 A** of the **Evidence Act** provides that electronic messages and digital material shall be admissible as evidence in any legal proceedings. **Sections 106A** and **B** of the **Evidence Act** in addition provides for the conditions for admissibility of electronic records. **Section 106A** of the **Evidence Act** provides that the contents of electronic records may be proved in accordance with the provisions of **section 106B**.

34. **Section 106 B** of the Act on the other hand provides that any information contained in an electronic record which is printed on a paper, or stored, recorded, copied in optical or magnetic media produced by a computer, is deemed to be a document and is admissible in evidence without further proof of the production of the original, provided that the conditions set out in **section 106B (2)** for the admissibility of evidence are satisfied.

35. The Respondent has not disputed the fact that the impugned photographs are electronic documents. The said documents therefore fall within the ambit of **section 106B** of the **Evidence Act**. The conditions set out in **section 106B (2)** of the **Evidence Act** are as follows:

“a) At the time of creation of the electronic record, the computer output containing the information was produced from a computer that was used regularly to store or process information for the purposes of any activities regularly carried on over that period by the person having lawful control over the use of the computer.

b) During the period, the kind of information contained in the electronic record was regularly fed in to the computer in the ordinary course of the activities.

c) Throughout the material part of the period, the computer was operating properly or, if not, the computer was out of operation for some period, but it was not such as to affect the electronic record or the accuracy of the contents.

d) The electronic record bears the information reproduced or is derived from such information fed into the computer in the ordinary course of the regular activities.”

36. **Section 106B (4)** of the **Evidence Act** further mandates the production of a certificate of authenticity of electronic evidence which is signed by a responsible person who was responsible for the computer on which the electronic was created or stored, in order to satisfy the qualifications, set out above. The certificate must uniquely identify the original electronic record, describe the manner of its creation, describe the particulars of the device that created it, and certify compliance with the conditions of **sub-section (2)** of **section 106B**.

37. In the certificate that has been produced in this court, the Petitioner’s advocate has stated that the Petitioner’s Director did send the photographs that she took on 22nd, 23rd, 24th, 27th and 28th September to his cell phone number 0720870983 which he printed using a computer that was operating properly without any interference to the photos or computer. In my view, and to the extent that the person who signed the certificate is the one who printed the photographs from a functioning computer, the photographs annexed on the Petitioner’s Director’s Affidavit meets the threshold provided for under **sections 106 A and B** of the **Evidence Act**.

38. Even if I was wrong on the question of the admissibility of the electronic evidence exhibited by the Petitioner, the alleged contemnors have not denied, by way of affidavit evidence, that indeed they instructed their agents to continue with the construction of the road after the court had restrained them to do so, and specifically on 23rd September, 2021 and 25th September, 2021. Indeed, the alleged contemnors have not denied that they were served with the order of this court on 17th September, 2021.

39. The importance of a Respondent in filing a Replying Affidavit to depone on matters of fact was stated by the Supreme Court of Kenya in the case of **Gideon Sitelu Konchellah v Julius Lekakeny Ole Sunkuli & 2 others [2018] eKLR** as follows:

“A Replying Affidavit is the principal document wherein a respondent’s reply is set and the basis of any submissions and/or List of Authorities that may be subsequently filed. Absence this foundational pleading, the Replying Affidavit, it follows that even the Written Submissions purportedly filed by the 1st Respondent on 17th August, 2018 are of no effect. Curiously, we further note that even the said Written Submissions are not dated, though this possibly might not have been fatal had the foundational document, the Replying Affidavit, been in order. The upshot is that as the 2nd and 3rd Respondents had categorically stated that they do not oppose the application, the Court will be excused for therefore deeming the application as being unopposed entirely.”

40. The failure by the alleged contemnors to controvert or deny the deposition by the Petitioner’s Director that they contravened the orders of this court by instructing their agents to continue developing the suit property is in itself an admission that they disobeyed the orders of the court. This, coupled with the photographic evidence on record leads me to conclude that the alleged contemnors willfully disobeyed the orders of this court of 17th September, 2021.

41. If courts are to perform their duties and functions effectively and remain true to the spirit which they are sacredly entrusted with, the dignity and authority of the courts have to be respected and protected at all costs. It is for this purpose that courts are entrusted with the extraordinary power of punishing those who indulge in acts, whether inside or outside courts, which tend to undermine their authority and bring them in disrepute and disrespect.

42. When the court exercises this power, it does so to uphold the rule of law and administration of justice. This court will not condone deliberate disobedience of its orders, and will not shy away from its responsibility to deal firmly and decisively with contemnors.

43. In the circumstances of this case, and for the reasons I have given above, it is my finding that the Petitioner has proved to the required standards that the alleged contemnors are in contempt of the orders of this court of 17th September, 2021.

44. Consequently, the Petitioner’s application dated 29th September, 2021 is allowed as follows:

a) The persons named below, being the Registered Trustees of the Respondent herein, be and are hereby found to be in contempt/disobedience of the orders of this court given on 17th September, 2021:

i. Dr. George Kwendo

ii. Hosea Kili

- iii. Julius Korir**
- iv. Matilda Kimetto**
- v. John Oscar Juma**
- vi. Peter Musa Kitesho**
- vii. Lucy Munjuga**
- viii. Joseph Kaberia**
- ix. Winfred Syombua**

b) The above named persons to appear in this court on a date to be fixed by the court for mitigation and sentencing.

c) The Respondent to pay the costs of the Application.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 2ND DAY OF DECEMBER, 2021.

O. A. ANGOTE

JUDGE

IN THE PRESENCE OF;

MS SEKAMI FOR MR. LITORO THE PETITIONER

MR. LUSWETI FOR MS WEKESA FOR THE RESPONDENT

COURT ASSISTANT: JOHN OKUMU