



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT KAJIADO**  
**INSOLVENCY CAUSE NO. 1 OF 2017**  
**IN THE MATTER OF THE WINDING UP OF NATURE GREEN HOLDINGS LIMITED**  
**AND**  
**IN THE MATTER OF INSOLVENCY ACT (NO. 18 OF 2015)**

**RULING**

**Background**

By notice of motion dated 2<sup>nd</sup> July, 2018 and filed in court on 3<sup>rd</sup> July, 2018, the applicant moved this court order the provisions of Section 1A, 1B, 3A 63(c) and (e) of the Civil Procedure Act, Order 40 rule 3, 4(4) of the Civil Procedure Rules, Section 27(b) and (k), 28(6) and 29(2) of the Contempt Act No. 46 of 2016 seeking an order that this court do find the respondent herein, Douglas Okeyo Oluoch together with Pinnacle Developers Limited be cited with contempt of court and their property be attached and the respondent committed for such period not exceeding 6 months.

This application is set out around an earlier order of this court of 19<sup>th</sup> June, 2018, in the following terms:

**A conservatory injunction order be and is hereby issued prohibiting any person or entity or the parties herein from interfering with, disposing, transferring, alienating sequestering, attaching, levying distress, levying execution, constructing on or dealing in any way that is prejudicial to the interest of the company herein with any of the assets subject to this petition, that is to say land parcels known as Kajiado/Kaputiei/32238, Kajiado/Kaputiei 32240, Kajiado/Kaputiei/32242, Kajiado/Kaputiei 32244, Kajiado/Kaputiei 32246, Kajiado/Kaputiei/32248, Kajiado/Kaputiei/32255, Kajiado/Kaputiei/32257, Kajiado/Kaputiei/32258 and Kajiado/Kaputiei/32259 pending the hearing and determination of the petition herein.**

It is argued that, despite the foregoing order being made in the presence of counsel for the applicant and the respondent being served on the same, the respondent continued construction on the parcels of land known as **Kajiado/Kaputiei 32238, Kajiado/Kaputiei/32240, Kajiado/Kaputiei 32242, Kajiado/Kaputiei 32244, Kajiado/Kaputiei/32246** in disregard of the order, and this amounts to contempt of court.

**Issues arising for determination**

(1) Whether the respondent is in contempt of this court's order.

In the constitutional petition of *Kenya National Human Rights Commission v the Attorney General*, Hon. Justice Chacha Mwita held that the entire contempt of court Act No. 46 is invalid for lack of public participation as required by articles 10 and 118(b) of the constitution and encroaches on the independence of the judiciary.

The applicant quoted the contempt of court Act No. 46 of 2016. The application was filed on 3<sup>rd</sup> July, 2018 before the contempt of the court act was declared unconstitutional on 9<sup>th</sup> November, 2018. Having said so, the contempt of court Act 2016 is not the correct governing procedure since its invalidity dates back to its commencement date or the date of birth which is in 2016.

The position was discussed in depth in the Supreme Court decision in the case of *Mary Wambui Munene v Peter Gichuki Kingara and 2 others – Supreme Court Petition No. 7 of 2014*; where the court discussed on the retroactivity of unconstitutional provisions, the court held that the invalidity of the Elections Act must apply from the date of commencement of the elections Act that is 2<sup>nd</sup> December, 2011.

Accordingly, the two decisions emphasize that any current legal require on contempt proceedings must be consistence with the values and rights provided in the constitution. The same constitution also highlights that the legal rights contracted in the bill of rights though jealously

protected are not absolute.

From the foregoing, I will turn our attention to the current applicable laws on contempt of court proceedings. Section 5 of the Judicature Act provides as follows:

***“The High Court and the Court of Appeal shall have the same power to punish for contempt of court as it is for the time being possessed by the High Court of Justice in England and that power shall extend to upholding the authority and dignity of the subordinate court.”***

To ascertain the time being we need to determine the applicable laws in England on contempt of court proceedings as at the time the application was brought to court. This was discussed in the matter of an application by **Gurbaresh Singh and Sons Limited** by Platt J. and Porter (as they were), where they stated that the expression for the time being which appears in Section 5 of the Judicature Act means that this court should ascertain the law of England as the time of trial. The law in England is governed by the Contempt of Court Act 1981; the penalty for being found in contempt is a maximum sentence of 2 years imprisonment.

However, no court shall impose a sentence under this Act for contempt of court unless it is satisfied that the contempt is of such a nature that it substantially, interferes or tends to substantially interfere with the due course of justice.

Definition of contempt is provided for the **Black’s Law Dictionary, 9<sup>th</sup> Edition, page 360** as: ***“Contempt is a disregard of, disobedience to, the rules, or orders of a legislative or judicial body, or an interruption of its proceedings by disorderly behavior or insolent language, in its presence or so near thereto as to disturb the proceedings or to impair the respect due to such a body”.***

In addition to the above definition in **B.C. G.E.U. V.A.G. 1988 2SC.R 214 – at 234** the court held as follows:

***“In some instances the phrase “Contempt of court” may be thought to be unfortunate because, as in the present cases, it does not posit any particular a version, abhorrence or distain of the judicial system. In a legal contempt the phrase is much broader than the common meaning of ‘contempt’ might suggest and embraces, where a person, whether a party to a proceeding or not does any act which may tend to hinder the course of justice or show disrespect to the court’s authority”, interfering with the business of the court on the part of a person who has no right to do so,” obstructing or attempting to obstruct the officer of the court on their way to their duties”.***

Section 28(1) (b) of the Supreme Court Act makes is an offence for a person to willfully or without lawful excuse to disobey an order of the court. This section allows the court to punish for contempt; it is therefore evident that the willful disobedience of a judgement, decree or order properly constitutes contempt of court.

The preponderance of proof in contempt proceedings is higher than a balance of probabilities as it is quasi criminal in nature. The standard of proof in contempt of court is established in the case of **Mutitika v Buhirini Farm Limited [1985] KLR, 234** the court held:

***“In our view, the standard of proof in contempt proceedings must be higher than proof on the 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, in criminal cases. It is not safe to extend to an offence which can be said to be quasi-criminal in nature.”***

On proving the elements of civil contempt, learned authors of the book contempt in modern New Zealand (**IP36,publications.lawscorn.govt.NZ**) have authoritatively stated 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.***

***(e) Contempt of court being part of a court’s inherent jurisdiction power should be exercised with scrupulous care and only when the circumstances are clear and beyond reasonable doubt.”***

The liberty of the respondent in this case could be affected. It is incumbent on the applicant to prove that the respondent conduct was deliberate or deliberately or willfully acted in a manner that breached the order. It was held in the case of **Katsuri Limited v Kapurchand Depar Shah Civil Case No. 25 of 2013** that: ***“an order committing a person to prison for contempt is to be adopted only as a last resort.”***

In the present case the court issued an order dated 19<sup>th</sup> June, 2018 prohibiting any person or entity or the parties herein from interfering with, disposing, transferring, alienating, sequestering, attaching, levying distress, levying execution, construction on or dealing in any way that is prejudicial to the interest of the company herein with any of the assets subject to this petition. That is to say land parcels known as Kajiado/Kaputiei 32238, Kajiado/Kaputiei 32246. The above order was clear and binding on the respondent as he is a party to the suit, vide

the affidavit of service dated 2<sup>nd</sup> July, 2018 it is clear that the respondent had knowledge of the order he declined to sign on grounds that his advocate was aware of the order, who accepted it by signing and stamping.

The applicant adduced evidence by way of photographs to prove that the respondent acted in breach of the terms of the order. The photographic evidence generated by a computer is a form of electronic evidence which is also deemed to be a document according to section 106(B)(1) of the Evidence Act. For electronic evidence to be admitted it must be accompanied by a certificate in accordance to Section 106(4) of the Evidence Act Cap. 80 Laws of Kenya. The applicant did not provide to the court a certificate to the court to accompany the photographs.

We cannot ascertain whether the defendant conduct was deliberate unless they are provided with an opportunity to defend themselves on why they chose to disobey the court order.

Applying this reasoning the applicant has not discharged the burden of proof for this court to cite the respondent for a contempt of court. On the other hand it must be emphasized that from the inventory of land parcels enumerated in the notice of motion there was some confusion as to actual registered interest in which the applicant obtained the set of photographs exhibited in support of the contempt proceedings. Accordingly in the instant case the application by the applicant to have the respondent cited for contempt fails with costs.

**Dated, signed and delivered in open court at Kajiado this 7<sup>th</sup> day of February, 2019.**

.....

**R. NYAKUNDI**

**JUDGE**

**Representation:**

Karanu for the applicant

Okoth for the respondent