



Jihan Freighters Limited v Kenya Railways Corporation Limited (Environment & Land Petition E013 of 2023) [2025] KEELC 4833 (KLR) (25 June 2025) (Ruling)

Neutral citation: [2025] KEELC 4833 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND PETITION E013 OF 2023**

**SM KIBUNJA, J
JUNE 25, 2025**

BETWEEN

JIHAN FREIGHTERS LIMITED PETITIONER

AND

KENYA RAILWAYS CORPORATION LIMITED RESPONDENT

RULING

1. The notice of motion dated the 5th August 2024, was filed by the petitioner, and seeks inter alia for the Managing Director of Kenya Railways Corporation Limited, the respondent, by himself or through his agents, servant, employees, proxies or tenants continuing to deny the petitioner access to the demised property, hence interfering with the petitioner's quiet possession of the demised property, contrary to and or in violation of the conservatory orders of injunction, given by the court on 14th November 2023, be committed for contempt of court, and be detained in prison for a period of six months, or such period as the court deems appropriate. The application is based on the nine (9) grounds marked (1) to (9) on its face and supported by the affidavits of Abdalla Salim Omar Abubakar, director, and Lameck Ochieng Odongo, general manager, sworn on the 5th August 2024, and 9th December 2024, respectively, inter alia deposing that the court issued conservatory orders on 14th November 2023, restraining the respondent from interfering with the petitioner's quiet possession of the suit property pending the hearing and determination of the application dated 6th November 2023; that the respondent breached the said order and the petitioner filed the contempt application dated 22nd November 2023, which was dismissed for among others, failure to prove disobedience through the ruling delivered on 29th May 2024; that upon the respondent expressing its preparedness through the letter dated the 15th November 2023 to allow the petitioner regain possession of the suit property, the court directed the petitioner to do so; that though the petitioner attempted severally to take possession, the respondent prevented it from doing so and should be held to be in contempt.



2. The application is opposed by the respondent through the replying affidavit of Phillip Mainga, the respondent's Managing Director, sworn on the 17th September 2024, and grounds of opposition dated 19th February 2025. It is the respondent's case inter alia the application is defective in form and substance; that under Order 42 Rule 4(2) of Civil procedure Rules, ex-parte orders lapse after 14 days unless extended by consent or by order of court; that the orders of 6th December 2023 among others extending the order of 14th November 2023 was not extended on the 7th February 2024, and by the time of the alleged disobedience, there were no orders capable of being disobeyed; that the supporting affidavit was defective by failing to have the photographic evidence accompanied by a certificate of electronic evidence in compliance with section 106B(4) of the *Evidence Act*, making the said photographs inadmissible; that the petitioner wrote to the respondent on 10th July 2024 indicating that it would take possession of the suit premises on 15th July 2024, but they responded that the date was not convenient to the respondent; that the respondent proposed that the taking of possession be scheduled for a mutually agreed date once the respondent had finalized with the internal arrangements, but the petitioner filed the instant application prematurely; that the respondent has at all times acted in compliance with the court orders and made every effort to facilitate the petitioner to access the suit premises; that the application is premature, without merit and should be dismissed with costs.
3. The court issued directions on filing and exchanging submissions on the 19th November 2024
4. The learned counsel for the respondent and petitioner filed their submissions dated the 25th February 2025 and 11th March 2025, respectively, which the court has considered.
5. The issues for the court's determinations are as follows:
 - a. Whether the court order of 14th November 2023 was in force, and if so whether the respondent disobeyed it.
 - b. Whether the managing director of the respondent and or any other person should be held in contempt of the said court order.
 - c. Who pays the costs?
6. The court has carefully considered the grounds on the notice of motion, affidavit evidence, grounds of opposition, submissions by the learned counsel, superior court's decisions cited thereon, the record and come to the following conclusions:
 - a. The record confirms that the court granted prayer 2 of the application dated 9th November 2023, on the 14th November 2023, that was to be in force until the next date, 6th December 2023. Contrary to the respondent's contention that the said order was ex-parte, the truth borne from the record is that it was not ex-parte as both Mr. Mogaka, then on record for the petitioner, and Mr. Mbaabu, the learned counsel for the respondent were present, and both made their oral submissions prior to the issuing of the order. The petitioner then filed the contempt application dated 22nd December 2023, which the court directed to be served and replies filed for mention on 6th December 2023. On that date, the court heard Mr. Abubakar, who had come on record for the petitioner, and Mr. Muturi, for the respondent and inter alia extended the order of 14th November 2023 to the 7th February 2024, directed replies be filed, both applications to be canvassed together through submissions to be filed and exchanged within timelines given. The proceedings of 7th February 2024, confirm that Mr. Abubakar and Mr. Muturi for the petitioner and respondent were present, but when the petitioner's counsel was called upon to respond to the respondent's counsel's submissions, his call had dropped and was not on the forum. The court proceeded to fix the contempt application dated the 22nd



November 2023 for ruling on 29th May 2024. The court delivered its ruling on 29th May 2024 as diarized, dismissing the application dated 22nd November 2023, and then fixed the notice of motion dated 6th November 2023 for ruling on the 9th October 2024. The record confirms that the interim order was extended.

- b. The petitioner then filed the instant notice of motion dated the 5th August 2024, and the court on 9th August 2024 issued directions for it to be served and replies filed for hearing on the 17th September 2024. On that date, Ms. Nkatha for the respondent, informed the court that parties were negotiating on the pending applications, and sought for 21 days to file replies if no settlement would have been made. That after Mr. Salim for the petitioner indicated he was not aware about the negotiations, the court directed the respondent to file their replies before the end of that day and adjourned the hearing to the 19th September 2024. On that day both counsel confirmed some negotiations were taking place and the court issued directions on filing and exchanging submissions. On 9th October 2024, the court delivered its ruling on the application dated 6th November 2023, granting injunction order in terms of prayer 3 and costs. It is evident that the respondent was dissatisfied with the said ruling as it filed the Notice of Appeal dated 15th October 2024 and applied for certified copies of proceedings and ruling. No further progress report about the appeal has been communicated to this court since that date.
- c. That though no specific prayer or order was made on 7th February 2024 to extend the order of 14th November 2023, the record confirms that the said interim order was indeed extended on the 29th May 2024, and a ruling date for the notice of motion dated 6th November 2023 fixed for 9th October 2024. The conduct of both parties, through the correspondence engaged towards according the petitioner access to the suit premises, and their learned counsel's submissions on some ongoing negotiations, could lead to only one conclusion, that both parties took the injunction order was still in force. It is a surprise therefore that counsel for the respondent appear to change directions and contend that there was no injunction order capable of being disobeyed, while he knew or ought to have known that the interim temporary injunction order in terms of prayer 2 of the notice of motion dated the 6th November 2023, issued on 14th November 2023, has been severally extended including on the 29th May 2024 when it was extended to 9th October 2024, when the ruling was delivered.
- d. Having settled the issue as to whether the injunction order of 14th November 2023 had lapsed on 7th February 2024, or was in force, and having found it was indeed in force, the next issue to determine is whether the respondent had disobeyed it. There is no doubt from the respondent's depositions that the order of 14th November 2023 was served upon it. Paragraphs 5 to 9 of the replying affidavit sworn by Phillip Mainga, Managing Director of the respondent, confirms knowledge of the order and some attempt to show preparedness to comply with it by allowing the petitioner access to the premises. However, the respondent has not shown any concrete steps it has taken to ensure the interim court order issued on 14th November 2023, about one year and a half ago, and confirmed on 9th October 2024, has been complied with. On the other hand, the petitioner has demonstrated the various attempts it has made since the order was made, including writing letters indicating the date it would take possession, but would be repulsed by the respondent through its named estate manager and GSU personnel. From the material facts presented by the petitioner, I have no doubt in finding that the respondent has disobeyed the court order.
- e. The petitioner has sought for the Managing Director of Kenya Railways Corporation Limited, the respondent, by himself or through his agents, servant, employees, proxies or tenants



continuing to deny the petitioner access to the demised property, hence interfering with the petitioner's quiet possession of the demised property, contrary to and or in violation of the conservatory orders of injunction, given by the court on 14th November 2023, be committed for contempt of court, and be detained in prison for a period of six months, or such period as the court deems appropriate. Though there may have been other people who by their acts or omissions prevented the petitioner from accessing the suit premises, all those persons are taken to have acted or failed to act on orders of the Chief Executive of the Corporation who is Phillip Mainga, the Managing Director, and he must take responsibility. The application is therefore found to be meritorious and the court finds Phillip Mainga, Managing Director, to be in contempt of the court order.

- f. Under section 27 of *Civil Procedure Act* chapter 21 of Laws of Kenya, costs follow the events unless where the court for good reasons shown finds otherwise. In this matter, the petitioner having succeeded in the application should have costs.
7. Having come to the above conclusions on the notice of motion dated the 5th August 2024, the court finds and orders as follows:
- a. That prayer (b) of the application is granted and the Managing Director of the respondent, Mr. Phillip Mainga, is found to have disobeyed the interim court order of 14th November 2023, that was confirmed on 9th October 2024, by continuing to deny the petitioner access to the suit premises.
- b. That the said Managing Director, Phillip Mainga, is hereby cited, for contempt of court, and is liable for civil sanctions.
- c. The respondent will meet the petitioner's costs.

It is so ordered.

DATED, SIGNED AND VIRTUALLY DELIVERED ON THIS 25TH DAY OF JUNE 2025.

S. M. KIBUNJA, J.

ELC MOMBASA.

IN THE PRESENCE OF:

PETITIONER ...: No Appearance

RESPONDENT : Mr. Muchiri for Mbaabu

SHITEMI-COURT ASSISTANT.

S. M. Kibunja, J.

ELC MOMBASA.

