

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KAKAMEGA
CIVIL APPEAL NO.20 OF 2021

ALFRED MANDILA----- 1ST APPELLANT
/RESPONDENT

DAVID NAMBALE ----- 2ND APPELLANT/
RESPONDENT

PHILIP LUCHELI NDINA----- 3RD APPELLANT/
RESPONDENT

VERSUS

MOSES SWALI----- RESPONDENT/
APPLICANT

RULING

1. The applicant filed a notice of motion application dated 2nd July 2024 seeking the following orders;

- a) THAT the Applicant herein be granted leave to institute contempt proceedings against the 1st, 2nd and 3rd Appellants/Respondents herein, ALFRED MANDILA, DAVID NAMBALE and PHILIP LUCHELI NDINA
- b) THAT a notice to show cause does issue against ALFRED MANDILA, DAVID NAMBALE and PHILIP LUCHELI NDINA as to why contempt proceedings ought not to be instituted against them for disobeying a lawful contempt order.
- c) THAT this Honourable court be pleased to commit ALFRED MANDILA, DAVID NAMBALE and PHILIP LUCHELI NDINA to civil jail for 6 months or for any such other punishment the court may deem fit to impose for being in contempt of this Honourable court's order issued on 20.11.2023

d) That the costs of this application be borne by the Appellants/Respondents

2. In support of his application, the Applicant aver that this court had issued orders to the effect that parties maintain a status quo that obtained as on the 20/11/2023. The orders were served on Respondents but the Applicants properties were attached in the execution of the decree.
3. Therefore the respondents acted in disobedience to the court's order, and as such, the respondents ought to be punished for contempt of the court's orders.

Applicant's submissions

4. The applicant case is that the court had issued orders on 20/11/2023 ordering that a status quo be maintained . The orders were properly served upon the respondents on 9.2.2024..
5. An affidavit of service was filed on 9.2.2024 .
6. The Applicant referred the court to the case of **Oilfield Movers Ltd vs. Zahara Oil & Gas Limited (2020) eKLR** and submitted that the respondents were aware of the orders and still disobeyed the court's orders.
7. The respondent was served with the orders on 9/2/2024 and the property was attached on 1/3/2024 and disposed off.
8. Further the Applicant submitted that the respondents' allegation that the Applicant never placed the stay of the execution order in the court file, as at the time of execution, cannot stand, as they had already been served with the court's orders.

9. On whether the respondent should be punished for contempt, the Applicant referred the court to the case of **Econet Wireless Kenya Limited vs. Minister for Information and Communication of Kenya Authority (2005) eKLR** and submitted that the respondents are liable for others deliberately and willfully disobeyed the court orders since the auctioneers were acting on the respondent's instructions, and implored the court to hold the respondents accountable for disobeying its orders and punish them accordingly.

Analysis and determination

10. I have carefully considered the notice of motion application dated 2nd July 2024, the affidavits on record, and the submissions. The main issue for determination is whether the respondents were properly served with the court's order dated 20th November 2023 and whether they deliberately disobeyed and thus they are in contempt of the court order.

11. The first issue to determine is whether the respondent was duly served with the court order. The Applicant asserts that the status quo order of 20th November 2023 was served on the Respondents on 9th February 2024, and an affidavit of service was filed

12. Knowledge of a court order is a prerequisite for contempt proceedings to ensure.

13. **In Board of Governors, Nairobi School v. John M. Mburu [2016] eKLR**, the court held: ***“Contempt proceedings require proof that the alleged contemnor was personally served with***

the order or had actual knowledge through legitimate means, as evidenced by an affidavit of service.”

14. The affidavit of service dated 9th February 2024 indicates receipt by the Respondents. No evidence has been adduced to rebut this.

15. In **Samuel M. N. Mweru v. National Land Commission & 2 Others [2017] eKLR**, the court ruled that an unrebutted affidavit of service establishes a presumption of proper service, placing the burden on the recipient to disprove receipt.

16. In the absence of a rebuttal from the respondents, this court finds that they were duly served and had actual knowledge of the court order.

17. On the second issue of whether the respondents disobeyed the court order deliberately, the applicant alleges that the respondents were aware that the court had issued a status quo order and still instructed the auctioneers to attach and dispose of his properties on 1st March 2024. The order required maintaining the state of affairs as of 20th November 2023, prohibiting execution proceedings. Contempt requires proof of willful disobedience. In **Republic v. Kenya Revenue Authority & Another Ex Parte Middle East Bank Kenya Ltd [2012] eKLR**, the court held: ***“Contempt is established when a party, with knowledge of a court order, intentionally acts in a manner that contravenes it, undermining the court’s authority.”***

18. The Respondents’ actions, through their agents, in executing the attachment after service of the order on 9th February 2024,

demonstrate deliberate non-compliance. Their defence that the order was not in the court file does not negate their obligation, the un rebutted personal service connotes their personal knowledge.

19. In **James Gachathi v. Director of Public Prosecutions & Another [2019] eKLR**, the court ruled that a party served with an order cannot rely on procedural excuses to justify non-compliance when knowledge is proven. This court finds that the Respondents willfully disobeyed the order.

20. Finally, the last issue is if the respondent should be held for contempt of court. It is to be noted that contempt proceedings serve to protect the court's dignity and enforce compliance.

21. In **Kariuki Kiboi v. Attorney General & Another [2017] eKLR**, the court stated, "***The court's power to punish for contempt is discretionary and aims to deter defiance while ensuring justice. Sanctions must be proportionate to the breach.***"

22. The Respondents' deliberate disobedience warrants sanctions to uphold the court's authority.

23. It is my view that committal to jail is a severe sanction and before the court resorts to it, it is fair to allow contemnors a chance to explain themselves/actions before punishment is meted on them therefore it is appropriate for notice to show cause to issue.

24. Accordingly, I do issue the following orders:

a) The Respondents are found to be in contempt of court orders issued on 20.11.2023..

b) A notice to show cause is issued against Alfred Mandila, David Nambale, and Philip Lucheli Ndina to appear before this court to explain why they should not be punished for contempt of the court order issued on 20th November 2023.

c) The prayer for committal to civil jail is deferred pending the Respondents' explanation owing to the hearing of the notice to show cause on 21.1.2026.

d) Costs of this application shall be borne by the Respondents.

f). Right of Appeal 30 days.

g). File closed.

**DATED, SIGNED AND DELIVERED IN OPEN COURT AT KAKAMEGA
THIS 22ND DAY OF OCTOBER, 2025.**

S.MBUNGI

JUDGE

In the presence of:-

CA: Angong'a

Mr. Orute holding brief for Ms. Rauto for the Applicant.

Moses Swali (Applicant) present.