



REPUBLIC OF KENYA

IN THE SENIOR PRINCIPAL MAGISTRATE'S COURT AT MAKINDU

ENVIRONMENT AND LAND CASE NO E036 OF 2023

DIANA NZOMO.....1ST PLAINTIFF/APPLICANT

RAEL MBITHUKA.....2ND PLAINTIFF/APPLICANT

KAMANTHE KIVASU.....3RD PLAINTIFF/APPLICANT

ZUHURA NDUNDA.....4TH PLAINTIFF/APPLICANT

NZIVILI KATUA.....5TH PLAINTIFF/APPLICANT

KILOKO NGUI.....6TH PLAINTIFF/APPLICANT

MARY KYUNGU.....7TH PLAINTIFF/APPLICANT

DIANA SALIM.....8TH PLAINTIFF/APPLICANT

AJELINA PETER.....9TH PLAINTIFF/APPLICANT

ALII MUSYOKA.....10TH PLAINTIFF/APPLICANT

MICHAEL MUNGUTI.....11TH PLAINTIFF/APPLICANT

VERSUS

EMMA KIVUVA.....1ST DEFENDANT/RESPONDENT

ARAFA JUMA.....2ND DEFENDANT/RESPONDENT

SOFIA KIVIU.....3RD DEFENDANT/RESPONDENT

KALWA PETER.....4TH DEFENDANT/RESPONDENT
MARY PAUL.....5TH DEFENDANT/RESPONDENT
MARY MUNYIVA.....6TH DEFENDANT/RESPONDENT
KOKI MANGELE.....7TH
DEFENDANT/RESPONDENT
KOKI MUASA.....8TH DEFENDANT/RESPONDENT
MUTUKU MUOKI.....9TH DEFENDANT/RESPONDENT
ALICE KITUU.....10TH DEFENDANT/RESPONDENT
BEATRICE MUNYAO.....11TH DEFENDANT/RESPONDENT
MUNYIVA MAKAU.....12TH DEFENDANT/RESPONDENT
KOKI NZOMO.....13TH DEFENDANT/RESPONDENT

AND

ESTHER MWOVA T/A KITISE PHARMACY.....1ST
TENANT/RESPONDENT
ZIPPORAH VYUTA.....2ND TENANT/RESPONDENT
REGINA WANVINYA.....3RD TENANT/RESPONDENT
EUNICE NTHENYA T/A ERIJMA CYBER.....4TH
TENANT/RESPONDENT
PETER MUJA T/A KWA PETER TYRES.....5TH TENANT/RESPONDENT
RUTH MUASA.....6TH TENANT/RESPONDENT
CAROLINE MBOYA T/A CAROL'S BEAUTY CENTRE.....7TH
TENANT/RESPONDENT
ISA JUMA.....8TH TENANT/RESPONDENT

MARY MUTHEU.....9TH TENANT/RESPONDENT

RULING

THE APPLICATION

The application for determination is dated 15/10/2024 and was filed by the plaintiffs pursuant to the provisions of Order 51 rule 1 of the Civil Procedure Rules and sections 1A, 1B, 3A and 63 of the Civil Procedure Act. The application seeks the following main orders, the others having been spent:

- 1) The tenants herein be cited for contempt of the order of this Honourable court issued on 20/8/2024 and they be subsequently imprisoned for a period not exceeding six months;
- 2) In the alternative, the court imposes a fine on the tenants herein and/or any other punishment permitted by law;
- 3) The costs of this application be borne by the tenants in any event.

The application is supported by the affidavit of the 1st plaintiff/applicant Diana Nzomo and is premised on the following general grounds:

- i. The alleged contemnors are tenants of the developed commercial plot No. 86 Makindu in which they are doing their various businesses;
- ii. On 20/8/2024 this Honourable court issued an order directing the tenants to deposit their rent into KCB account no. 1309994072 pending hearing and determination of this suit;
- iii. The respondents were duly served with the order on 21/8/2024;
- iv. In blatant disregard of the said order, the tenants herein have failed to deposit the rent in the aforementioned account and it is only prudent that the respondents be punished for their disobedience;
- v. It is important that the orders of this Honourable court are obeyed to protect the sanctity of this court;

vi. It is imperative that this Honourable court oversees the compliance with its orders.

In the affidavit in support of the application, the deponent reiterated the grounds on the face of the application and attached documents to buttress their case. She further deposed that following the issuance of the orders, their Advocate wrote a letter which was circulated to all the tenants informing them to deposit rent in the bank account.

RESPONSE BY THE TENANTS/RESPONDENTS

The tenants opposed the application by filing a replying affidavit sworn by the 9th tenant. She deposed that she was one of the tenants on the suit premises and had authority from his fellow tenants to swear the affidavit on their behalf. The deponent deposed that the tenants were not party to the suit giving rise to the orders in issue. That their Landlord was equally not party to the suit and that the orders issued were against individuals, not Ivuso Manyatta Women group or persons acting on its behalf. It was further deposed that the tenants entered into an agreement with Ivuso Manyatta Women group and not the plaintiffs not defendants. That the orders in issue were not served upon the tenants by either the applicants or the landlord. The deponent stated that no directions were given to them to deposit the rent in a particular account. The deponent further deposed that the tenants paid rent until 12/8/2024 when they received instructions from the Landlord's representative to stop paying rent until the matter is heard and determined.

RESPONSE BY THE DEFENDANTS/RESPONDENTS

The defendants also opposed the application by filing a Replying affidavit sworn by Sofia Kiviu, the 3rd defendant herein. She deposed that the tenants were not party to the suit and that the defendants were not served with the court orders and penal notice. That after being served with the instant application, the defendants explained the situation to the tenants and asked them to deposit rent in the bank account. The defendants stated that since December, 2024, the tenants have been depositing rent in the said bank account. A bank statement was attached to the affidavit. The defendants argued that the tenants have fully complied with the orders of the court. That the application has been overtaken by events.

MAIN ISSUES FOR DETERMINATION

In my view, the main issues for determination are:

- i. Whether the tenants are in contempt of the orders issued herein;
- ii. Whether the tenants ought to be punished by the court;
- iii. Who should bear the costs of the application?

SUBMISSIONS BY THE PLAINTIFFS/APPLICANTS

The applicants submitted that the Replying affidavit by the tenants was filed by counsel without having filed a notice of appointment. They urged the court to strike out the affidavit. The applicants submitted that all the tenants were served with the orders in issue and later with a letter by counsel for the applicants, informing them of the court order. The applicants argued that they had met the threshold for an application for contempt. They relied on authorities whose copies were not annexed.

SUBMISSIONS ON BEHALF OF THE DEFENDANTS

The defendants filed written submissions. The defendants argued that they were not served with the orders. They challenged the affidavit of service on several grounds. It was submitted that after being informed of the orders, the defendants notified the tenants who then complied with the orders. The defendants argued that the applicants had not established that the tenants conduct was deliberate and wilful. That contempt proceedings are quasi-criminal in nature and as such, they require a high degree of proof. The defendants contended that the applicants had not discharged the burden and urged the court to dismiss the application. The relied on several authorities but only one was annexed.

ANALYSIS AND DETERMINATION.

The Black's Law dictionary, 10th edition defines the term contempt as:

1. The act of state of despising.
2. The quality, state or condition of being despised.
3. Conduct that defies the authority or dignity of a court or legislature.

It has also been defined as:

“.....a disregard of, or disobedience to, the rules or orders of a legislative or judicial body, or an interruption of its proceedings by disorderly behaviour or insolent language, in its presence or so near thereto as to disturb the proceedings or to impair the respect due to such body .” - Edward M. Dangel, Contempt, at 2 (1939).

The Black’s Law dictionary, 10th edition further defines civil contempt as the failure to obey a court order that was issued for another party’s benefit.

Jurisdiction

Section 10 of the Magistrates Court Act provides in part as follows:

“(1) Subject to the provisions of any other law, the Court shall have power to punish for contempt.

(2) A person who, in the face of the Court —

(a) assaults, threatens, intimidates, or insults a magistrate, court administrator, judicial officer, or a witness, during a sitting or attendance in Court, or in going to or returning from the Court;

(b) interrupts or obstructs the proceedings of the Court; or

(c) without lawful excuse disobeys an order or direction of the Court in the course of the hearing of a proceeding, commits an offence.

(3) In the case of civil proceedings, the willful disobedience of any judgment, decree, direction, order, or other process of a court or willful breach of an undertaking given to a court constitutes contempt of court.

(4) In the case of criminal proceedings, the publication, whether by words, spoken or written, by signs, visible representation, or otherwise, of any matters or the doing of any other act which—

(a) scandalizes or tends to scandalize, or lowers or tends to lower the judicial authority or dignity of the court;

(b) prejudices, or interferes or tends to interfere with, the due course of any judicial proceedings; or

(c) interferes or tends to interfere with, or obstructs or tends to obstruct the administration of justice, constitutes contempt of court. (Emphasis supplied)

Section 63(c) of the Civil Procedure Act provides that in order to prevent the ends of justice from being defeated, the court may, if it is so prescribed, grant a temporary injunction and in case of disobedience commit the person guilty thereof to prison and order that his property be attached and sold. Order 40 rule 3 of the Civil Procedure Rules provides:

“(1) In cases of disobedience, or of breach of any such terms, the court granting an injunction may order the property of the person guilty of such disobedience or breach to be attached, and may also order such person to be detained in prison for a term not exceeding six months unless in the meantime the court directs his release.

(2) No attachment under this rule shall remain in force for more than one year, at the end of which time, if the disobedience or breach continues, the property attached may be sold, and out of the proceeds the court may award such compensation as it thinks fit, and shall pay the balance, if any, to the party entitled thereto.

(3) An application under this rule shall be made by notice of motion in the same suit.”

The foregoing confirms that this court has jurisdiction to punish for contempt of its orders in case of breach.

Standard of proof

In the authority of *Republic v Mohammed & another [2018] KESC 51 (KLR)*, the Supreme Court held as follows:

“We are also conscious of the standard of proof in contempt matters. The standard of proof in cases of contempt of Court is well established. In the case of Mutitika v. Baharini Farm Limited [1985] KLR 229, 234 the Court of Appeal held that:

‘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 wit, in criminal cases. It is not safe to extend it to an offence which can be said to be quasi-criminal in nature.'

The rationale for this standard is that if cited for contempt, and the prayer sought is for committal to jail, the liberty of the contemnor will be affected. As such, the standard of proof is higher than the standard in civil cases. This power, to commit a person to jail, must be exercised with utmost care, and exercised only as a last resort. It is of utmost importance, therefore, for the respondents to establish that the alleged contemnor's conduct was deliberate, in the sense that he or she willfully acted in a manner that flouted the Court Order."

The foregoing implies that the standard of proof in contempt proceedings is higher than a balance of probabilities but below beyond reasonable doubt.

Ingredients of contempt

The Supreme Court of India held in *Indian Airports Employees Union v Ranjan Catterjee & Another* [AIR 1999 SC 880: 1999(2) SCC: 537, that:

'...in order to amount to "civil contempt" disobedience must be willful. If disobedience is based on the interpretation of court's order, notification and other relevant documents, it does not amount to willful disobedience.'

Similarly, the Supreme Court of India in *Mahinderjit Singh Bitta v Union of India & Others* 1 A NO. 10 of 2010 (13th October, 2011) held that:

"In exercise of its contempt jurisdiction, the courts are primarily concerned with enquiring whether the contemnor is guilty of intentional and willful violation of the order of the court, even to constitute a civil contempt. Every party is before the court and even otherwise, is expected to obey the orders of the court in its spirit and substance. Every person is required to respect and obey the orders of the court with due dignity for the institution."

The emphasis as shown in the above cases is that there must be ***"willful and deliberate disobedience of court orders."*** There cannot be deliberate and willful disobedience, unless

the contemnor had knowledge of the existence of that order. And because contempt is of a criminal nature, it is always important that breach of the order be proved to the required standard; first, that the contemnor was aware of the order having been served or having personal knowledge of it, and second; that he deliberately and willfully disobeyed it. The **Cromwell J**, writing for the Supreme Court of Canada in **Carey v Laiken, 2015 SCC 17** (16th April 2015), expounded on the three elements of civil contempt of court which must be established to the satisfaction of the court, thus:

- i. The order alleged to have been breached must state clearly and unequivocally what should and should not be done. This ensures that a party will not be found in contempt where an order is unclear. An order may be found to be unclear if, for example, it is missing an essential detail about where, when or to whom it applies; if it incorporates overly broad language; or if external circumstances have obscured its meaning;
- ii. The party alleged to have breached the order must have had actual knowledge of it. It may be possible to infer knowledge in the circumstances, or an alleged contemnor may attract liability on the basis of the willful blindness doctrine;
- iii. The party alleged to be in breach must have intentionally done the act that the order prohibits or intentionally failed to do the act that the order compels.

Writing on proving the elements of civil contempt, learned authors of the book *Contempt in Modern New Zealand* available at ip36.publications.lawcom.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.”

The applicants attached a copy of the order on their supporting affidavit. The terms of the order are clear and unambiguous. The plaintiffs/applicants attached a copy of an affidavit of service by one Julius Mwololo Mbithi. I have carefully perused the affidavit of service. The application has been made against the tenants. Paragraph 9 of the affidavit of service states:

“That after effecting service to the defendants herein, I proceeded to the tenants on commercial plot No. 86 in Makindu upper market where I served all the tenants being Esther Mwova T/A Kitise Paharmacy, Zipporak Vyuta, Regina Wavivya, Gabriel Mutinda, Eunice Nthenya T/A Erijima Cyber, Peter Muia T/A Peter Tyres, Ruth Muasa, Caroline Mboya T/A Carol’s beauty centre, Isa Juma and Mary Mutheu with the Order where they acknowledged service but declined to sign on my copy”.

The process server did not disclose how he knew where to find the commercial premises and/or the tenants. He does not disclose how he was able to identify the tenants so as to serve them. It is not clear whether the tenants were served while together or separately. It is not indicated whether the tenants were known to the process server before. I am not convinced that the tenants were served with the order in issue. On that ground alone, the application must of necessity fail.

DISPOSITION

The upshot of the above considerations is that the application dated 15/10/2024 is devoid of merit. I proceed to dismiss it. Each party shall bear own costs.

**DATED, SIGNED AND DELIVERED IN OPEN COURT AT MAKINDU THIS 9TH DAY OF OCTOBER,
2025.**

Y.A SHIKANDA

SENIOR PRINCIPAL MAGISTRATE.

