

REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS
COURT AT KISUMU
CAUSE NO. 129 OF 2013

(Before Hon. Justice Dr. Jacob Gakeri)

KENYA HOTELS AND

ALLIED WORKERS UNION.....

CLAIMANT

VERSUS

PRAYING MANTIS LIMITED

(OCTOPUS

CLUB)

.....RESPONDENT

RULING

Before the Court for determination is the Applicant's Notice of Motion dated 1st September 2025 filed under Certificate of Urgency seeking orders that:

- 1. Spent.*
- 2. Spent.*
- 3. The Honourable Court be pleased to issue Orders for the arrest and detention of Mr. William Mc Tough the Director of the Judgment Debtor to civil jail until the declared amount is satisfied.*

4. The Honourable Court be pleased to issue any other Orders it deems fit to ensure the Judgment Orders are fully satisfied.

5. Respondent be Ordered to pay costs of this suit.

The Notice of Motion is expressed under Order 22 Rule 31 of the Civil Procedure Rules and Sections 1A, 1B, 3A and 3B of the Civil Procedure Act and is based on the grounds set out on its face and the Supporting Affidavit of Mr. Ngame sworn on 1st September 2025 who deposed that Judgment was entered in the claimant's favour on 28th January 2021 in the sum of Kshs.1,950,790 and the sum stood at Kshs.2,746,999.41, inclusive of accrued interest.

The affiant further deposed that Mr. Mc Tough paid Kshs.300,000.00 on 21st July 2021 but declined to pay the balance and the Garnishee Order *nisi* made absolute on 14th November 2024 recovered only Kshs.940.5 and the balance remained outstanding.

That the Judgment Debtor's Managing Director was withholding the amount due to the grievants through proxy companies to avoid execution.

That the grievants would suffer prejudice if the Orders sought were not granted.

Respondent's case

By a Replying Affidavit sworn by Mr. William Mc Tough on 7th November 2025, the affiant deponed that the company in question was now defunct by dint of Gazette Notice No. 1337 of 11th October 2024 and the applicant did not object to the striking out of the company's name by the Registrar of Companies.

That the affiant had not provided a personal guarantee of the company's liabilities or obligations and defended the company as its Director.

The affiant admitted having executed a consent on behalf of the company on 21st July 2021 for payment of the decretal sum but the Court of Appeal halted compliance.

That the liability in question was incurred by the company and there was no evidence that he had acted fraudulently and was not liable for debts of a defunct company and committal to civil jail would be unconstitutional as it

would violate his constitutional right and freedom of liberty and dignity.

Previously the respondent's counsel had filed a Notice of Preliminary Objection dated 20th September 2025 that the defendant was a limited company separate and distinct from its directors and the summoning of its Directors would be premature and ill advised.

In response to the Notice of Preliminary Objection the applicant deposed that Mr. Mc Tough was a Principal Director of the Judgment Debtor and cited the company wind up its affairs to stifle the decree and initiated the consent to disable the decree and acted as an active agent and in person by payment of Kshs.300,000 from his personal account thus accepting liability.

That the respondent had not deposited security for the security on appeal to the Court of Appeal.

The affiant deposed that since Mr. Mc Tough identified himself as the Managing Director of the respondent and involved himself with improper design to deny the grievants their terminal dues, the corporate ought to be pierced for purposes of enforcement.

According to the applicant, the Employment Act granted the claimant the right to sue and hold Mr. Mc Tough liable for the debts of the respondent.

Applicant's submissions

Mr. Ngame for the applicant submitted on the issue whether Mr. William Mc Tough acted in deceit in enabling the Judgment Debtor evade Orders of the court and placed reliance on Section 2 of the Employment Act to urge that despite the statutory definition of the term employer, Mr. Mc Tough fraudulently obtained stay Orders without depositing security and wound up the company to evade execution and there was need to pierce the corporate shell to commit him to civil jail and did not appeal the court's ruling on lifting of the veil dated 14th November 2024.

That the Civil Procedure Rules empowered the court to summon Mr. Mc Tough and Sections 38 and 40 of the Civil Procedure Act were not unconstitutional.

Reliance was placed on the decisions in **Charles Lutta Kasamani V Concord Insurance Co. Ltd & Deputy Registrar Milimani High Court Commercial & Admirally Division** [2018] eKLR, on committal for civil contempt as well as the sentiments of the court in **Braeburn Ltd V Gachoka & another** [2009] eKLR, on dishonest and fraudulent debtor and **Jane Wangui Gachoka V Kenya Commercial Bank Ltd** [2013] eKLR, on limitations of the right to personal liberty, to urge the court to dismiss the Preliminary Objection.

Concerning the Notice of Preliminary Objection, it is common ground that the *locus classicus* rendition of what constitutes a Preliminary Objection are the sentiments of Law JA and Sir Charles Newbold P. in **Mukisa Biscuit Manufacturing Co. Ltd V West End Distributor Ltd** [1969] EA 696 where Law JA held

“So far as I am aware a Preliminary Objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a Preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court, or a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration”.

Sir Charles Newbold P stated:

The first matter relates to the increasing practice of raising points, which should be argued in the normal manner, quite improperly by way of Preliminary Objection. A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if a fact had to be ascertained or if what is sought is the exercise of judicial discretion”.

As to whether the respondent’s Notice of Preliminary Objection raises a competent Preliminary Objection, the court proceeds as follows:

It is trite law that a registered company is a legal person distinct and separate from its members and managers. It is a body corporate or incorporated association with rights and subject to obligations, with capacity to contract, sue or be sued, own property and enjoys perpetual succession.

This principle was enunciated by the House of Lords in its *locus classicus* decision in **Salomon V Salomon & Co. Ltd** [1897] AC. 22 where Lord Mac Naghten stated:

“... The company is at law a different person altogether from the subscribers to the memorandum’ and though it may be that after incorporation the business is precisely the same as it was before and the same persons are managers, and the same hands receive the profits, the company is not in law the agent of the subscribers to the or trustee for them. Nor are the subscribers as members liable in any shape or form, except to the extent and in the manner provided by the Act.”

This principle is captured in Section 19 of the Companies Act which provides:-

From the date of incorporation of a company—

- (a) the subscribers to the memorandum, together with such other persons as may from time to time become members of the company, become a body corporate by the name stated in the certificate of incorporation;**
- (b) the company can do all of the things that an incorporated company can do;**

The principle of legal or corporate personality of the registered company remains one of the hallmarks of corporate law in common law jurisdictions.

However, the principle of legal or corporate personality of the company is not absolute. Indeed both the legislature and judicial pronouncements have qualified the rule in many instances where regard is had to the subscribers or directors, or a company is deemed to be part of the group of companies for certain purposes such as accounting, fraudulent trading, evasion of existing legal obligations, fraud, or improper conduct, agency or trustee and taxation among others.

To this extent, the court is not persuaded that the respondent's Notice of Preliminary Objection meets the threshold enunciation in **Mukisa Biscuit Manufacturing Co. Ltd V West End Distributors Ltd** (supra) and it is dismissed.

The applicant is seeking the arrest of Mr. Mc Tough and committal to civil jail until the decretal sum is paid. This is to all intents and purposes a contempt application styled differently.

In the instant case, it is common ground that the applicant sued the respondent company vide a Memorandum of Claim dated 10th May 2013 and

Judgment was entered in its favour on 13th November 2020, for kshs.1,950,790.00 with interest at court rates and costs were assessed at Kshs.50,000.00.

Although the applicant deponed that Mr. Mc Tough paid Kshs.300,00.00 and even executed a consent and appealed the decision of Radido J on stay of execution which was given but the appeal dismissed, the judgment was entered against Praying Mantis Ltd (Octopus Club) and that remains the position and the reason why the court made the Garnishee Order *nisi* issued on 26th August, 2024 absolute, was that Mc Tough was using the account as that of the company as well. The account belonged to the company too. The obligation to pay the decretal sum remained on the company as it was the employer and the applicant did not sue Mr. Mc Tough together with the company.

Similarly, although the applicant alleged that Mr. Mc Tough was using other proxy companies to avoid execution, none of the alleged companies was identified or any information about the companies to provided. Such information would have had serious implications on Mr. Mc Tough's position as a director of the company.

Be that as it may, it is trite law that he who alleges must prove the allegations to the prescribed standard of proof, which in this instance is on balance or preponderance of probabilities.

The provisions of Section 107, 108 and 109 of the Evidence Act are unambiguous on who bears the burden of proof.

See in this regard, **Munya V The Independent Electoral and Boundaries Commission & 2 others** [2014] KESC 38 (KLR), **Ann Wambui Nderitu V Joseph Kiprono Ropkoi & another** [2005] IEA 334, **Ignatius Makau Mutisya V Reuben Musyoki Muli** [2015] KECA 612 (KLR) and **Miller V Minister of Pensions** [1947] 2 ALLER 372.

In the absence of proof to show that Mr. Mc Tough had acted fraudulently or engaged in activities that would justify the lifting of the veil of incorporation, the liability to liquidate the amount outstanding remains on the company.

It is trite law that fraud must be specifically pleaded and strictly proved.

See **Ndolo V Ndolo** [2008] 1 KLR 742, **Arthi Highway Developers Ltd V West End Butchery Ltd & 6 others** [2015] eKLR, **RG Patel V Lalji Malanji** [1957] EA 314, **Demutilla Nanyama Pururmu V Salim Mohamed Salim** [2021] eKLR.

Relatedly, the respondent averred that the respondent company had already been struck off the register of companies and the requisite notice of dissolution was published on 11th October 2024. Dissolution of the company takes place 3 months thereafter, if there is no objection or the objection is unsuccessful.

The applicant did not respond to this issue directly, or controvert it, which suggests that the respondent company may not be in existence.

The last issue, on which the applicant's Notice of Motion turns is whether Mr. Mc Tough should be arrested and committed to civil jail for non-payment of the decretal amount.

Put in the alternative, whether Mr. Mc Tough is guilty contempt of court.

It requires no emphasis that court Orders must be obeyed by persons against whom they are made or directed. They are sacrosanct. They are not optional and leave no room for personal discretion and are not empty platitudes. Court Orders are grounded on law, which is the overarching principle of the concept of rule of law.

These sentiments were aptly captured by the Court of Appeal in **Shimmers Plaza Ltd V National Bank of Kenya Ltd** [2015] eKLR thus;

“We reiterate here that court Orders must be obeyed. Parties against whom such Orders are made cannot be allowed to trash them with impunity. Obedience of court Orders is not optional, rather it is mandatory and a person does not choose whether to obey a court Order or not. For as Theodore Roosevelt the 26th President of the United States of America once said:

“No man is above the law and no man is below it; nor do we ask any man’s permission to obey it. Obedience to the law is demanded as a right not as a favour”.

See also **Miguna Miguna V Dr. Fred Matiang’i & 7 others** [2018] eKLR, **Econet Wireless Kenya Ltd V Minister of Information of Kenya & another** [2005] eKLR, **Refrigeration and Kitchen Utensils Ltd V**

Gulabchand Popatlal Shah & another Civil App. No. 39 of 1990, **Republic V Attorney General & another Ex Parte Mike Maina Kamau and Teachers Service Commission V Kenya Union of Teachers and others [2013] eKLR**, on the essence of punishing contempt of court.

By seeking the arrest and committal to civil jail, the applicant is urging that Mr. Mc Tough is guilty of contempt by disobeying court Orders.

It requires no accentuation, that a person(s) who alleges that court Orders have been disobeyed is bound to support those allegations with sufficient evidence of the alleged disobedience.

The elements or requirements of contempt of court are well settled.

In **Samuel M. N. Mweru & 2 others V National Land Commission and 2 others** [2020] eKLR, the court held:

“It is an established principle of law that in order to succeed in civil proceedings the applicant has to prove (i) the terms of the Order (ii) knowledge of these terms by the respondent (iii) Failure by the respondent to comply

with the terms of the Order. Upon proof of these requirements, the presence of wilfulness and bad faith on the part of the respondent would normally be inferred, but the respondent could rebut this inference by contrary proof on a balance of probabilities...”

The Court further itemised the four elements of contempt of court including as the last one that the defendant's conduct must have been deliberate or intentional.

This element was amplified by the Court of Appeal in **Newton Kagira Mukuha V Charles Mukuna Gashire & 14 others** [2023] KECA 1482 (KLR), as follows:

“It is trite that the refusal to obey should be both wilful and mala fides and that unreasonable non-compliance provided it is bona fide does not constitute contempt. The applicant must show that the offence is committed not by mere disregard of a court Order, but by the deliberate and intentional violation of the court's dignity repute and authority”.

See Mativo J (as he then was) in **Republic V Attorney General & another Ex Parte Mike Maina Kamau** (supra).

Significantly, the standard of proof in civil is higher than the ordinary balance of probabilities in civil cases. In **Mutitika V Baharini Farm Ltd** [1985] KLR 234 the Court of Appeal stated:

“In our view the standard of proof in contempt proceedings 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 an offence which can be said to be quasi-criminal in nature...”

In the instant case, the applicant tendered no evidence to prove that the Orders in question were against Mr. Mc Tough or that he was legally liable for obligations of the respondent company and a demand coupled with a penal notice had been served upon him.

Similarly, service of the Orders to Mr. Mc Tough personally was neither demonstrated nor explained or knowledge of the terms of the Order.

Finally, the applicant availed no evidentiary proof of deliberate or intentional disobedience of any court Orders by Mr. Mc Tough.

For the foregoing reasons, it is the finding of the court that the applicant/claimant has failed to prove that Mr. Mc Tough has committed any acts or omissions which constitute contempt of court for an Order of arrest and sentence to civil jail until the decretal amount is satisfied to issue.

Even if contempt of court was proved against Mr. Mc Tough, the maximum duration of imprisonment is 6 months.

In the upshot, the applicant/claimant's Notice of Motion dated 1st September 2025 is without merit and it is dismissed.

Parties shall bear their own costs.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT
KISUMU ON THIS 3RD DAY OF DECEMBER 2025.**

**DR. JACOB GAKERI
JUDGE**

ORDER

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with **Order 21 Rule 1 of the Civil Procedure Rules**, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159(2)(d) of the Constitution which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of **Section 1B of the Civil Procedure Act (Chapter 21 of the Laws of Kenya)** which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

DR. JACOB GAKERI
JUDGE