

**IN THE COURT OF APPEAL
AT NAIROBI**

(CORAM: KIAGE, ACHODE & KORIR,

JJ.A.) CIVIL APPEAL NO. 528 OF 2019

BETWEEN

**JOSHUA KIMEU KIOKO 1ST
APPELLANT JAMES KIOKO KIVUVO
2ND APPELLANT JOHN BOSCO NDIINGA
..... 3RD APPELLANT SAMUEL MWANZA NZIOKA ..
..... 4TH APPELLANT JUVENALIS MUSYOKI
KAVITA 5TH APPELLANT
MUNGU NGOLO 6TH
APPELLANT ROSE NDANU MUTUA
7TH APPELLANT**

AND

**WENDANO MATUU CO. LTD 1ST
RESPONDENT STEPHEN NDAMBUKI MULI
2ND RESPONDENT ONESMUS MUISYO KIMATU
..... 3RD RESPONDENT**

(Being an appeal from the judgment and decree of the High Court of Kenya at Machakos (G.V. Odunga, J.) delivered on 21st January 2019

in

HCCC No. 2 of 2014)

JUDGMENT OF THE COURT

1. This appeal arises from the ruling by the High Court at Machakos, where learned Judge G. V. Odunga, J. (as he then was) found the appellants guilty of contempt of court. The facts surrounding the ruling were that on 19th May 2014, the High

Court issued an order restraining the appellants from conducting any extraordinary and annual general meetings of the 1st respondent pending *inter partes* hearing of an application that was scheduled for 25th June 2014.

The appellants, however, proceeded to hold what they termed a special general meeting on 22nd May 2014. It is this sequence of events that led to the respondents' application dated 24th June 2014 seeking to cite the appellants for contempt. The application was allowed, giving rise to this appeal.

2. In the memorandum of appeal, the appellants raise the following nine grounds, which we reproduce verbatim hereunder:

“1. The Honourable Judge erred in both law and fact in failing to note and to appreciate the fact that the Court's Order dated 19th May 2014 was NEVER served on the appellants, and had been given by the superior court on a date prior to the date set for hearing of the Respondents' Notice of Motion dated 8/5/2014; which the said court had earlier fixed for hearing on 20/5/2014.

2. The Honourable Judge erred in both law and fact in failing to note and to appreciate the fact that the existence of the Superior Court's Order dated 19/5/2014 was NOT made known to the appellants until long AFTER the Special General meeting of the 1st Respondent's shareholders scheduled for 22/5/2014 had taken place.

3. The Honourable Judge erred in both law and fact in failing to note and to appreciate the fact that the appellants were NOT in court on 19/5/2014 when the Superior Court's Order dated the said date (19/5/2019 (sic)) was given.

4. The Honourable Judge erred in both law and fact in failing to note and to appreciate the fact that whereas the court order dated 19/5/2014 "restrained the appellants, employees or agents from planning, attending and or holding any extra-ordinary and Annual General Meetings of the 1st respondent", what

was held on 22/5/2014 was a Special General Meeting.

- 5. The Honourable Judge of the Superior Court erred in both law and fact in failing to note and to appreciate the fact that the Court's Order dated 19/5/2014 DID NOT restrain the appellants from holding all forms of meetings and/or general meetings of the 1st respondents' shareholders, and that the said order was NOT clear and unambiguous.**
 - 6. The Honourable Judge erred in both law and fact in failing to consider ALL the matters presented to the court by the appellants in opposition of the respondents' Notice of Motion dated 25/6/2014, and thereby arrived at a one-sided decision.**
 - 7. The Honourable Judge of the Superior Court erred in both law and fact in considering extraneous matters, and thereupon making a finding that the appellants were in contempt of court.**
 - 8. The Honourable Judge erred in both law and fact in arriving at a finding which was against the weight of evidence presented before him.**
 - 9. The Honourable Judge erred in both law and fact in failing to note and to appreciate the fact that the appellants could not be punished or made to suffer for mistakes of their counsel in failing to inform them (the appellants) of the existence of the Court's Order dated 19/5/2014."**
3. In opposition to the contempt application, the appellants filed a replying affidavit where it was averred that the order said to have been disobeyed was extracted on 20th May 2014 and that they were only made aware of the same on 30th May 2014 after the meeting had been held. The appellants also contended that the order was vague, as it only barred the holding of

extraordinary meetings while leaving room for shareholders to hold other forms

of meetings, including the special general meeting held on 22nd May 2014. The appellants contended that what was held was a **“special general meeting”** and not an annual general meeting or extraordinary meeting that was enjoined by the court. Additionally, they contended that the respondents failed to prove contempt on the part of the appellants beyond a reasonable doubt, as they had not established that a meeting was held and that the order was served personally on the appellants before 22nd May 2014.

4. When the appeal came up for virtual hearing, learned counsel, Mr. Benjamin Nzei, was present for the appellants, while there was no representation for the respondents, despite counsel being duly served by the Court’s registry. Learned counsel, Mr. Nzei, relied on the written submissions as filed.
5. In their submissions, the appellants contend that the High Court erred in finding that the orders were properly served upon them. According to counsel, the orders were issued on a date not reserved for the hearing of the application, and that they were not personally present in court. They argue that while their previous advocates were present, they were not informed of the orders until much later. They maintain that the mistakes of an advocate should not be visited upon an innocent litigant and that their prompt change of representation upon realising the mistakes of their previous counsel demonstrates that they were diligent litigants. Additionally, the appellants argue that the respondents

failed to prove contempt to the required standard. They rely on **Mutitika vs. Baharini Farm Ltd (1985) KECA 60 (KLR)** to assert that the standard of proof for contempt is higher than a balance of probabilities. Counsel also referred to **Jihan Freighters Limited vs. Hardware & General Stores Limited (2015) KECA 285 (KLR)** to emphasise that because contempt proceedings are quasi- criminal and can lead to the deprivation of liberty, the court orders in question must be clear and unambiguous in both substance and procedure. Counsel argues that where personal liberty is at stake, the proof must be consistent with the gravity of the alleged contempt. Still on this issue, counsel submitted that the evidence used against the appellants, being minutes of an alleged meeting, was of unknown origin, a fact conceded by the respondents during cross-examination. The appellants submit that the trial court failed to appreciate the need to prove that the appellants acted in contempt of the court order.

6. The appellants additionally submitted that the proceedings culminated in a mistrial because the trial court ignored a Preliminary Objection regarding the respondents' *locus standi* and authority to institute the proceedings. They maintain that the respondents lacked the required *locus standi* to institute the matter. They refer to a related judgment, **Wendano Matuu Co Ltd & 2 Others vs. Kioki & 6 Others [2025] eKLR**, which found that neither the appellants nor the respondents were valid directors of the company at the time, hence the respondents

lacked the capacity to cite the appellants for contempt. They conclude that by

disregarding their jurisdictional and procedural challenges, the court violated the **principle of *audi alteram partem*** (hear the other side). They maintain that the superior court's refusal to determine the preliminary objection concurrently with the contempt application vitiated the proceedings and led to a fundamentally flawed contempt finding.

7. The respondents did not file submissions for the Court's consideration.
8. This being a first appeal, we are required to review issues of both facts and law and come to our own independent conclusions. In doing so, we should not interfere with the findings of fact by the trial court unless they were based on no evidence, on a misapprehension of the evidence, or unless the trial Judge is shown demonstrably to have acted on wrong principles in reaching his findings - see **Selle vs. Associated Motor Boat Co. Limited (1968) EA 123**. Within the foregoing lenses, we have addressed ourselves to the appeal and the submissions of learned counsel. In our view, this appeal raises three pertinent issues for determination, to wit, whether the appellants were aware of the order, whether the order was specific, and whether they acted in violation of the order.
9. Before delving into the identified issues, we must concur with the learned Judge with respect to his statement of the law of contempt in Kenya. Currently, the statutory basis of contempt of court law is **section 5** of the **Judicature Act**, which provides as

follows:

“5.(1) The High Court and the Court of Appeal shall have the same power to punish for contempt of court as 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 subordinate courts.

(2) An order of the High Court made by way of punishment for contempt of court shall be appealable as if it were a conviction and sentence made in the exercise of the ordinary original criminal jurisdiction of the High Court.”

10. In addition, **section 63 (c)** of the **Civil Procedure Act** provides that a disobedience of an order of temporary injunction will attract punishment in the form of imprisonment or attachment and sale of the contemnor’s property. Therefore, there is no doubt that obedience of court orders is not optional and disobedience of a court order has repercussions. It is often said that deliberate disobedience of court decisions undermines the rule of law and that the power to punish for contempt is inherent in the court and is essential for maintaining the authority and dignity of the judicial process.

11. In **Wekesa & 2 Others vs. Munialo [2025] KECA 679 (KLR)**, the Court approved the ingredients of contempt as stated by Mativo, J. (as he then was) in **Samuel M. N. Mweru & Others vs. National Land Commission & 2 Others [2020] eKLR** as follows:

“32. Regarding the elements of contempt of court, Mativo J., in the same case laid them down as follows:

“It is an established principle of law that in order to succeed in civil contempt 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 willfulness 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.

Perhaps the most comprehensive of the elements of civil contempt was stated by the learned authors of the book Contempt in Modern New Zealand, who succinctly stated:

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; 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:(d) the defendant's conduct was deliberate.””

12. We fully associate with the foregoing, and the law stated therein forms the basis upon which we will render ourselves on this appeal. One of the contentions by the appellants is that the order in question was ambiguous. The appellants submit that, whereas the order barred them from holding any extraordinary and annual general meetings of the 1st respondent pending

the *inter partes*

hearing, what was held was a special general meeting falling outside the scope of the order.

13. Indeed, the Court in **Mukuha vs. Gashwe & 14 Others** [2023] KECA 1482 (KLR) emphasized the need for clarity as follows:

“26. Cromwell J., in Carey vs. Laiken, 2015 SCC 17 enumerated three (3) elements to be satisfied in contempt proceedings as follows: “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.”

14. The Court, while still stressing the importance of specificity in an order that is the subject of a contempt application, held that:

“36. We find that if there is need to read into an order more than that which is explicitly stated therein, the Court would not be expected to find a party to be in contempt of court as the interpretation given to the order in issue, would have gone beyond the explicit words of the order.

37. Often times, this Court has emphasized the need to make clear the actual factual position in relation to the subject matter whose status quo is to be maintained. The order should leave no room for more than one clear interpretation. The order herein was clear on the status quo be

maintained.”

15. The relevant portion of the order issued on 19th May 2014 reads as follows:

“IT IS FURTHER ORDERED THAT:

1. An order be and is hereby issued restraining the defendants, employees and or agents from planning, attending and or holding any extraordinary and Annual General Meetings of the 1st plaintiff pending the hearing and determination of the application herein or further orders of the court pending the hearing of the inter partes on 25/6/2014.”

16. The order restrained the appellants from conducting any extraordinary and annual general meetings of the 1st respondent pending the *inter partes* hearing of the application dated 8th May 2014. In our view, the order was clear, precise, and incapable of misunderstanding. Its purpose was to preserve the *status quo* and prevent the appellants from convening meetings of the general membership that could affect the governance or affairs of the 1st respondent. We are unable to accept the appellants' argument that the meeting held on 22nd May 2014 was a special general meeting and therefore fell outside the terms of the order. Courts look to the substance rather than the form of an act. A party cannot evade compliance with a court order by clever drafting or semantic ingenuity. A meeting of members convened to transact corporate or organizational business, regardless of the label attached to it, fell within the ambit of the restraint imposed by the High Court. It is therefore our finding that the allegation of an ambiguity in the order is misplaced

since the order was succinctly clear and capable of being complied with.

17. The next step is to determine whether the appellants had knowledge of the order. As the learned Judge appreciated, the jurisprudence on this issue has shifted from strict personal service to the contemnor's knowledge of the order. The Court in **Shimmers Plaza Limited vs. National Bank of Kenya Limited** [2015] KECA 945 (KLR) appreciated as much when it held that:

“On the other hand however, this Court has slowly and gradually moved from the position that service of the order along with the penal notice must be personally served on a person before contempt can be proved. This is in line with the dispensations covered under 81.8 (1) (supra).

Kenya's growing jurisprudence right from the High court has reiterated that knowledge of a court order suffices to prove service and dispense with personal service for the purposes of contempt proceedings.”

18. Similar holding was upheld in **Wekesa & 2 Others vs. Munialo** (Civil Appeal 28 of 2019) [2025] KECA 679 (KLR), thus:

“These decisions reflect a shift towards emphasizing the contemnor's awareness of court orders over the formalities such as personal service, thereby reinforcing the enforceability of judicial directives. This same judicial attitude applies in cases, such as the present one, where individuals who have become aware of court orders seek to reconstitute themselves into a different body or to act in different capacities with the sole aim of defeating the court orders as issued. Once it had been shown that the appellants had knowledge of the court orders, their attempts to act as the Board of Nzoia

Water Services Company Limited with a view to effectuating the very thing the court orders had stayed, cannot succeed.”

19. In the present case, the record shows that the appellants' advocate was present in court when the order was issued. Knowledge of an order by counsel is, in law, the same as knowledge by the client. This principle was affirmed in **Shimmers Plaza Limited vs. National Bank of Kenya Limited** (supra), where the Court held that parties cannot dissociate themselves from the knowledge of their advocates acquired in the course of proceedings. In that regard, the Court opined that:

“Would the knowledge of the judgment or order by the advocate of the alleged contemnor suffice for contempt proceedings? We hold the view that it does. This is more so in a case such as this one where the advocate was in Court representing the alleged contemnor and the orders were made in his presence. There is an assumption which is not unfounded, and which in our view is irrefutable to the effect that when an advocate appears in court on instructions of a party, then it behoves him/her to report back to the client all that transpired in court that has a bearing on the client’s case...

... Therefore, a client may be similarly "served" with a court's order by his attorney's communication of its contents and this communication is presumed if the attorney has knowledge of the order.”

20. The appellants herein have not demonstrated sufficiently that they were not in communication with their advocates. This would have been done by the advocates swearing an affidavit to aver the failure by his firm to communicate to the clients. As this was an ongoing dispute, we do not envisage a scenario in which such

an order was made, but the advocate silently went to his chambers

and declined to pass the information to the clients. Additionally, the appellants' contention that what was held was a special general meeting, rather than an extraordinary meeting or an annual general meeting, indicates that they were aware of the order but ingeniously attempted to circumvent it. Accordingly, we are satisfied that the appellants had actual knowledge of the order and were fully aware of its terms at the time they convened the meeting on 22nd May 2014.

21. As we have already held, the injunctive relief sought to prevent a meeting of members convened to transact corporate or organisational business, regardless of the nomenclature applied to the order. But even if the order was ambiguous, which we already have held it was not, the appellants would still not be entitled to disregard it and defeat its purpose. What they were required to do was to move back to court to seek clarification on the scope of the order as opposed to ingeniously circumventing it. In this regard, our views receive backing from Romer, L. J. in the House of Lords decision in **Hadkinson vs. Hadkinson** [1952] ALL ER 567 wherein he held that:

“It is the plain and unqualified obligation of every person against, or in respect of, whom an order is made by a court of competent jurisdiction to obey it unless and until that order is discharged. The uncompromising nature of this obligation is shown by the fact that it extends even to cases where the person affected by an order believes it to be irregular or even void. Lord Cottenham, L.C., said in Chuck -vs- Cremer (1) (1 Coop. temp.Cott 342):

“A party, who knows of an order, whether null or valid, regular or irregular, cannot be permitted to disobey it... It would be most dangerous to hold that the suitors, or their solicitors, could themselves judge whether an order was null or valid- whether it was regular or irregular. That they should come to the court and not take upon themselves to determine such a question. That the course of a party knowing of an order, which was null or irregular, and who might be affected by it, was plain. He should apply to the court that it might be discharged. As long as it exists it must not be disobeyed.””

22. The last element that we must consider is whether the disobedience was willful or intentional. The Court in **Mukuha vs. Gashwe & 14 Others** (supra) held that the refusal to obey should be both willful and *mala fides*, and that unreasonable non-compliance, provided it is bona fide, does not constitute contempt. Willfulness may be inferred from deliberate conduct inconsistent with a subsisting court order. The appellants did not seek clarification, variation, or stay of the order. Instead, they proceeded, within two days of its issuance, to convene a meeting plainly intended to achieve what the order sought to forestall.
23. The standard of proof in contempt cases is one commonly referred to as intermediate. It is one beyond a balance of probability but certainly not beyond a reasonable doubt. It lies in between the standards of proof in civil cases and criminal cases. Perhaps to restate what we have already established, the appellants, knowing of the existence of the order, sought to

recast the name of the meeting and categorise it as a special general meeting. Unfortunately, the aim did not change, as the activity the court

sought to halt had been achieved. Assessing the facts alluded to in the motion and the response given by the appellants, we have no difficulty, like the learned Judge, in finding that the disobedience was willful and intentional.

24. From the foregoing, we find no error on the part of the learned Judge. We find no basis for interfering with the High Court's decision. The learned Judge properly directed himself on the law and the evidence, and arrived at a conclusion fully supported by the evidence and the law. For the foregoing reasons, the appeal is devoid of merit and is hereby dismissed. The finding of contempt and the orders of the High Court are affirmed.

25. The respondents having not participated in the appeal, we make no orders as to costs.

Dated and delivered at Nairobi this 25th day of March 2026.

P. O. KIAGE

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**JUDGE OF
APPEAL**

L. ACHODE

.....

**JUDGE OF
APPEAL**

W. KORIR

.....

**JUDGE OF
APPEAL**

*I certify that this is
a true copy of the original*

Signed
DEPUTY REGISTRAR