



**Kalinga & 3 others v Muoki & 7 others (Civil Appeal  
E010 of 2025) [2026] KEHC 4549 (KLR) (9 March 2026) (Ruling)**

Neutral citation: [2026] KEHC 4549 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KWALE  
CIVIL APPEAL E010 OF 2025**

**F ANDAYI, J  
MARCH 9, 2026**

**BETWEEN**

**MARY CHARLES KALINGA ..... 1<sup>ST</sup> APPLICANT**

**JOSEPHINE WAIRIMU KINYANJUI & 2 OTHERS & 2  
OTHERS ..... 2<sup>ND</sup> APPLICANT**

**AND**

**TERESIA B MUOKI ..... 1<sup>ST</sup> RESPONDENT**

**COUNTY ASSEMBLY OF KWALE & 6 OTHERS & 6  
OTHERS ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

1. This matter arose from an election petition filed in the Magistrates' Court by the appellant/applicant herein. The election petition was dismissed by the trial court and the appellant, dissatisfied with that decision appealed to this court. On 14th September 2023 this court, Hon. Mr. Justice Magare Dennis Kizito Ngwono allowed the appeal and set aside the judgment of the trial court to a large extent and substituted it with orders inter alia as are relevant to the present application that:
  - i. A declaration that Fartun Mohamed Musa, Josephine Wairimu Kinyanjui, Augustine Ndegwa, Mulki Abdullahi Adan and Rachael Katumbi Mutisya, the 2nd, 3rd, 4th, 5th and 11th respondents herein were not validly elected as nominated members of the County Assembly of Kwale and as such declared the said seats as vacant,
  - ii. Certificates under section 86 of the *Elections Act* to issue accordingly.
  - iii. The 1st respondent, IEBC to choose from the qualifying lists provided by the parties in the proportions of the votes garnered by prioritizing under the marginalized groups as provided in section 36 of the *Elections Act*.



- iv. The IEBC to conclude nominations to fill the vacant seats within 14 days.
  - v. None of the candidates found to have been invalidly elected are eligible for re-election.
  - vi. The Clerk to the County Assembly of Kwale to ensure the newly nominated persons were sworn on the nearest Tuesday within 7 days of appointment;
2. Further appeals by the respondents to the Court of Appeal and Supreme Court were dismissed. The Court of Appeal decision was made on 22nd March 2024 while the Supreme Court decision was rendered on 28th June 2024.
  3. The 5th respondent filed a constitutional petition in Kwale High Court Constitutional and Human Rights Petition No. E003 of 2024 Mulki Abdullahi Adan vs Independent Electoral and Boundaries Commission and Speaker, County Government of Kwale, alleging breaches of her fundamental rights under *the constitution*. The penultimate prayer in the constitutional petition was that this court grants a declaration that the petitioner (5th respondent herein) is a duly nominated member of the County Assembly of Kwale under Article 177 of *the constitution* and a mandatory order of injunction be issued directing the IEBC and the Speaker of the County Assembly of Kwale to accept, uphold and allow the petitioner's nomination as a member of the County Assembly of Kwale and the right to participate in all the proceedings of the Assembly.
  4. Alongside the petition she filed an application dated 8th July 2024 praying for an interim conservatory order of injunction restraining her de-gazettement as the duly nominated member of the County Assembly of Kwale by United Democratic Movement (UDM) party and the 2nd respondent from swearing any new nominated member by UDM. Interim conservatory orders of injunction were granted on 16th September 2024 in the terms sought meaning that implementation of the judgment of this court dated 14th September 2023 was halted and the 5th respondent herein continued to serve as an elected nominated member of the County Assembly of Kwale. The constitutional petition by the 5th respondent was subsequently struck out on 22nd January 2026.
  5. The appellant herein filed the present Notice of Motion dated 5th December 2024 seeking the following orders:
    - i. A prohibitive injunction/freezing order do issue forthwith against the County Assembly of Kwale staying and freezing payment of salaries, remuneration, allowances, perks and benefits to the 2nd 3rd, 4th, 5th, and 11th respondents from the date of filing this application until the hearing and determination of the appellant's/applicant's application.
    - ii. a prohibitive injunction does issue forthwith barring and prohibiting the 2nd, 3rd, 4th, 5th, and 11th respondents from attending the County Assembly of Kwale House and Committee sittings and events and conducting/transacting any business of the Kwale County Assembly whether official or otherwise.
    - iii. leave be granted to the appellant/applicant to institute contempt of Court proceedings against the 1st, 2nd, 3rd, 4th, 5th and 11th respondents and the 1st Interested Party, 2nd Interested Party and 3rd Interested Party namely Marjan Hussein Marjan, Seth Mwatela Kamanza and Fatuma Hassan Mwalupa and the 2nd, 3rd, 4th, 5th, and 11th respondents and the Kwale County Assembly respectively.
    - iv. the Court issues warrants of arrest and commit Marjan Hussein Marjan, Seth Mwatela Kamanza, Fatuma Hassan Mwalupa, Fartun Mohamed Musa, Josephine Wairimu Kinyanjui, Augustine Ndegwa, Mulki Abdullahi Adan and Rachael Katumbi Mutisya to prison for their willful and contemptuous disobedience of lawful and valid Court Orders issued on 14th



September 2023 and their continued unlawful actions and omissions in disobedience of the orders.

6. The application is premised on grounds set out on the face of the application and expounded in the affidavit sworn on 5th December 2024 of Mary Charles Kalinga, the appellants/applicants.
7. The applicant deposes that in spite of this court's orders declaring the 2nd, 3rd, 4th, 5th and 11th Respondents' seats of MCAs within the County Government of Kwale vacant, the said respondents have continued to participate in the proceedings of the County Assembly. She has annexed to her supporting affidavit copies of photos showing the 5th Respondent attending the Kwale County Assembly plenary sessions.
8. She deposes further that the 1st respondent, the IEBC, was yet to comply with the court's order to within 14 days conclude nominations and fill the seats declared vacant by the court and had not degazetted the 2nd, 3rd, 4th, 5th and 11th Respondents as ordered by Court and neither has the 1st Respondent gazetted fresh names including the Applicant as ordered by Court and so was in contempt of the court orders. I have emphasized on the words in bold underlined because the court did not make such an order that in gazetting fresh names, the IEBC should include the name of the 1st applicant.
9. Further that the 1st Respondent, IEBC had also failed to comply with the court's order to pay costs of KShs. 500,000/= to the applicant as the cumulative costs of the election petition and appeal before the Magistrate's Court and High Court.
10. With respect to the 3rd Interested Party, Clerk of the Kwale County Assembly, that he had failed to comply with the court's order to ensure that newly nominated MCAs are sworn in on the nearest Tuesday within 7 days of appointment.
11. Further that the 2nd Interested Party, Speaker of the Kwale County Assembly, as the titular head of the Kwale County Assembly had not ensured compliance with the order of communication by the Chair of the House to the House (Kwale County Assembly) and to IEBC of declaration of vacancies and actual declaration of vacancies in the five (5) nominated MCA seats and swearing in of new nominated members as ordered by the High Court.
12. Further that the 2nd, 3rd, 4th, 5th and 11th respondents in disobedience of the the court's orders had deliberately and obstinately ignored, refused, failed and neglected to keep off/away from the Kwale County Assembly official sittings and functions and also continued drawing and collecting allowances, benefits, perks, salaries and remuneration on account of their positions which positions had been declared to be invalid, null, void unconstitutional and vacant.
13. Further that the Interested Parties namely, the County Assembly of Kwale 1st Interested Party, the Speaker County Assembly of Kwale, 2nd Interested Party, the Clerk County Assembly of Kwale, 3rd Interested Party had flouted and continued to flout the orders of the court by failing to bar and prohibit the 2nd, 3rd, 4th, 5th and 11th respondents from attending sittings and functions of the County Assembly of Kwale and also failed to prevent them from drawing and collecting allowances, benefits, perks, salaries and remuneration on account of their positions which have been held by the High Court to be invalid, null, void unconstitutional and vacant.
14. The applicant deposes further that in refusing to obey and comply with the Judgement and Orders of the Court dated 14th September 2023 the 1st, 2nd, 3rd, 4th, 5th and 11th respondents together with the 1st, 2nd, and 3rd Interested Parties are in flagrant breach and contempt of lawful and valid court orders.



15. It is the applicant's position that all the respondents and Interested Parties are aware and have full knowledge of the judgment and orders of the court as delivered on 14th September 2023 as they were properly represented by their advocates on record and were subsequently served with the said judgement and court orders. The applicant has annexed to her supporting affidavit letters dated 20th September 2023, 1st July 2024 and 15th August 2024 communicating the issuance of the orders of the court to the 1st respondent and Interested Parties in vain.
16. The appellant deposes further that after the High Court judgment of 14th September 2023, the respondents were aggrieved and appealed to the Court of Appeal Mombasa in Election Petition Appeal No. E002 of 2023: Josephine Wairimu & 4 Others -vs- Mary Charles Kalinga & 6 Others; which appeal was struck out and dismissed by the Court of Appeal at Mombasa on 22nd March, 2024.
17. Further that the respondents were dissatisfied with the Court of Appeal decision and appealed further to the Supreme Court of Kenya in Supreme Court Petition (Application) No. E014 of 2024 between Josephine Wairimu & 4 Others -vs- Mary Charles Kalinga & 6 others. That the Supreme Court dismissed with finality the respondents second and final appeal in a ruling delivered on 28th June, 2024.
18. According to the applicant, in dismissing the respondents' appeal, the Supreme Court of Kenya upheld and gave a seal of approval to the High Court judgment and orders issued on 14th September 2023.
19. The applicant asserts that all the respondents and Interested Parties and their advocates were at all times present in the court proceedings and during delivery of the respective judgments at the Chief Magistrate's Court, High Court, Court of Appeal and finally at the Supreme Court. That they had been further notified through correspondence of the respective courts judgements and orders but despite having knowledge of the court orders they had persisted in their contempt and disobedience to date.
20. The applicant deposes that further to the foregoing she had filed a Petition with the County Assembly of Kwale raising the same issues in this application but the respondents and Interested Parties have ignored the same. She has annexed to the affidavit a copy of the Petition dated 15th August 2024.
21. The applicant deposes that for this long, she has been denied enjoyment of fruits of the judgment delivered on 14th September 2023 by the High Court in Mombasa as a result of willful disregard and disobedience of valid court orders by the respondents and Interested Parties herein hence this application for contempt of court against them.
22. That it is therefore in the best interests of justice and the rule of law that the sanctity, dignity and honour of this court be restored by citing the respondents and Interested Parties for contempt of court orders for them to show cause why they should not be imprisoned.
23. The respondents and IPs did not file any response to the application. It is however apparent that the 6th, 7th, 8th, 9th and 10th Respondents are not affected by the proceedings in this application and therefore needed not to respond.
24. The Law and procedure for contempt of court is governed by section 5 of the Judicature Act (Cap. 8) Laws of Kenya which provides as follows:

“Contempt of court

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 such power shall extend to upholding the authority and dignity of subordinate courts.



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.”

25. Section 36 of the High Court Organization and Administration Act (Cap. 8C) Laws of Kenya) also has provisions on the High Court’s power to punish for contempt of court as follows:

“S. 36.

1. A person who —
  - a. assaults, threatens, intimidates or wilfully insults a judge, judicial officer or a witness, involved in a case during a sitting or attendance in a court, or while the judge, judicial officer or witness is travelling to and from a court;
  - b. wilfully and without lawful excuse disobeys an order or directions of the court in the course of the hearing of a proceeding;
  - c. within the premises in which any judicial proceeding is being heard or taken, or within the precincts of the same, shows disrespect, in speech or manner, to or with reference to such proceeding, or any person before whom such proceeding is being heard or taken;
  - d. having been called upon to give evidence in a judicial proceeding, fails to attend, or having attended refuses to be sworn or to make an affirmation, or having been sworn or affirmed, refuses without lawful excuse to answer a question or to produce a document, or remains in the room in which such proceeding is being heard or taken after the witnesses have been ordered to leave such room;
  - e. causes an obstruction or disturbance in the course of a judicial proceeding;
  - f. while a judicial proceeding is pending, makes use of any speech or writing misrepresenting such proceeding or capable of prejudicing any person in favour of or against any parties to such proceeding, or calculated to lower the authority taken;
  - g. publishes a report of the evidence taken in any judicial proceeding that has been directed to be held in private;
  - h. attempts wrongfully to interfere with or influence a witness in a judicial proceeding, either before or after he or she has given evidence in connection with such evidence;
  - i. dismisses a servant because he or she has given evidence on behalf of a party to a judicial proceeding; or



- j. commits any other act of intentional disrespect to any judicial proceedings, or to any person before whom such proceeding is heard or taken, commits an offence.
  - 2. A police officer may, by order of the Court, take into custody and detain a person who commits an offence under subsection (1) until the Court adjourns.
  - 3. A person who commits an offence under subsection (1) shall on conviction be liable to imprisonment for a term not exceeding five days, or to a fine not exceeding one hundred thousand shillings, or to both.
  - 4. In exercise of its powers under this section, the Court shall observe the principles of fair administration of justice set out in Article 47 of *the Constitution*.”
- 26. I do not find under this section a provision that deals directly with the issue of disobedience of court orders as is the case herein. The section seems to deal with criminal contempt rather civil contempt. For that reason, the law on civil contempt is as contained in section 5 of the *Judicature Act* above.
- 27. The essential ingredients of civil contempt of court, particularly for disobedience of court orders, are as explained in the case of Republic v The County Executive Member In Charge of Finance & Economic Planning County Government of Mombasa & 2 others [2022] KEHC 614 (KLR) by Mativot, J. (as he then was) that an applicant must prove:
  - i. Existence of a lawful court order. There must be a clear, unambiguous, and binding order or decree issued by a court of competent jurisdiction. The terms must be capable of being complied with.
  - ii. Knowledge of the order by the respondent. The respondent must have been served with the order or otherwise made aware of it. Actual knowledge may be proved by service, participation in proceedings, consent orders, or conduct demonstrating awareness.
  - iii. Ability to comply with the order- It must be shown that the respondent had the capacity, means, or legal authority to comply with the order, either wholly or substantially. In civil contempt, impossibility of compliance can be a defence; hence ability must be demonstrated by the applicant unless admitted or obvious.
  - iv. Wilful disobedience or failure to comply. Here, the applicant must show that the respondent deliberately, knowingly, and intentionally failed to comply. Mere non-compliance is not sufficient; the conduct must amount to wilful disobedience, neglect, or indifference to the court’s authority.
- 28. In its Issues Paper titled “Contempt in Modern New Zealand”, NZLC IP36 also available on the Internet at the Law Commission’s website: [www.lawcom.govt.nz](http://www.lawcom.govt.nz), the Law Commission of New Zealand considering the issue of civil contempt of court has stated as follows:-
 

“There are essentially four elements that must be proved to make the case for civil contempt. The applicant must prove ...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, normally as the result of personal service;
  - c. the defendant has acted in breach of the terms of the order; and,
  - d. the defendant’s conduct was deliberate.”
29. This court is required to determine that each of these ingredients has been established against each of the respondents and IPs.
30. In the case of *Mutitika v Baharini Farm Ltd* [1985] KECA 60 (KLR) the Court of Appeal held that the standard of proof of contempt of court must be beyond a balance of probabilities but not beyond reasonable doubt. The Court of Appeal said:
- “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. We envisage no difficulty in courts determining the suggested standard of proof. 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 offence which can be said to be quasi – criminal in nature...”
31. There however seems to be a difference in the Kenyan and New Zealand approaches on the standard of proof required for civil contempt of court. Whereas New Zealand applies the criminal standard of beyond reasonable doubt, the Kenyan standard is lower being between the civil standard of balance of probabilities and criminal standard of beyond reasonable doubt.
32. The burden of proof of the contempt alleged against the respondents and Interested Parties is on the applicant.
33. As stated above, the Supreme Court decision was rendered on 28th June 2024 and the 5th respondent filed a constitutional petition in Kwale High Court Constitutional and Human Rights Petition No. E003 of 2024 *Mulki Abdullahi Adan vs Independent Electoral and Boundaries Commission and Speaker, County Government of Kwale*, alleging breaches of her fundamental rights an interim conservatory order of injunction restraining her de-gazettement as the duly nominated member of the County Assembly of Kwale by United Democratic Movement (UDM) party and the 2nd respondent from swearing any new nominated member by UDM. Interim conservatory orders of injunction were granted on 16th September 2024 in the terms sought meaning that implementation of the judgment of this court dated 14th September 2023 was halted and the 5th respondent herein continued to serve as an elected nominated member of the County Assembly of Kwale.
34. This effectively meant that the 1st respondent IEBC and the Interested Parties could not carry into effect the orders of the court dated 14th September 2024 as against the 5th respondent. It was not until the later orders were vacated by this court on 22nd January 2026 when this court struck out the 5th Respondent’s petition in which the conservatory orders had been issued that it can be said that in her case she could afterwards be in breach of the court’s orders of 14th September 2023. Therefore, with respect to the 5th Respondent, the purport of the contempt proceedings herein must be considered in line with the proceedings in that constitutional petition.
35. The appeal herein was initially filed at the High Court in Mombasa. It was afterwards transferred and received at this court and fixed for mention on 30th April 2025. At the initial mentions only counsel for the 1st Respondent appeared. He indicated that the matter was related to CHRP No. E003 of 2024 and that since the same had been fixed for mention for further directions on 2nd July 2025, this matter could as well be mentioned on that date and that was done. However, it was not until 24th



- September 2025 that the applicant's counsel appeared for the first time. There was also counsel for the 1st respondent IEBC Mr. Muyundo, counsel for the IPs Mr. Amakobe. There was no appearance by the respondents or counsels for the other respondents R2, R3, R4, R5 and R11.
36. Learned counsel for the R1, IEBC and the IPs informed this court that there were conservatory orders staying proceedings in this matter, one issued by the Constitutional Division of the High Court in Nairobi in Constitutional Petition No. E369 of 2024 in respect of this matter and filed by the sitting MCAs and another in Kwale CHR Petition No. E003 of 2024 of which counsel for the applicant was aware and therefore the Rs could not take any step in this matter. In his rejoinder learned counsel for the applicant said that the Rs were being mischievous because they had filed CHR Petition No. E369 of 2024 in Nairobi but he was not aware of the one filed in Kwale. He was therefore only aware of the conservatory orders in the CHR petition in Nairobi. He then said that they should file their responses herein and bring up that issue.
  37. The Court then gave directions that it would be best if the Rs and IPs filed their responses in this matter and directed that the same be filed and served within 21 days.
  38. The matter was mentioned on 22nd October 2025 and this time, besides the counsels who were present the previous time Mr. Kariuki came on record for the 3rd Respondent, Josephine Wairimu. All the respondents and the IPs had not filed their respective responses.
  39. Mr. Kariuki then indicated that his client had never been served with the application.
  40. Upon listening to the arguments by learned counsels the court issued directions fixing the application for ruling with directions to the respondents to file their respective responses.
  41. In the course of dealing with CHR petition No. E003 of 2024, it became apparent that with respect to the 5th Respondent who was involved therein, this court could not proceed with the present application before disposing of that petition. The petition was determined on 22nd January 2026 when the same was struck out.
  42. In the meantime, the Respondents herein did not file their responses to this application nor even make available the conservatory orders staying the proceedings herein in Nairobi CHR Petition No. E369 of 2024. However, learned counsel for the applicant Mr. Atonga had acknowledged twice that there are such conservatory orders.
  43. At this point, I find that it will be remiss of this court to proceed with the determination of this application when information has been brought to its attention by learned counsels, including learned counsel for the applicant, as officers of this court, that there could be orders staying proceedings in this matter. It is only fair that this court gets sight of those orders in order to appreciate their full purport and tenure before proceeding further. For instance, this court has found that the orders in Kwale CHR Petition No. E003 of 2024 affected the 5th respondent. That means that R1, R2, R3, R4 and R11 could not claim to enjoy the protection of those orders.
  44. Contempt of court proceedings are meant to ensure that the dignity of the court is preserved through observance of its orders but more fundamentally that the rule of law is upheld all the time (see the case of Refrigeration and Kitchen Utensils Ltd v Gulabchand Popatlal Shah & Another Civil Application No.39 of 1990 as reported in Shimmers Plaza Limited v National Bank of Kenya Limited [2015] KECA 945 (KLR). That is why it is quasi criminal in nature and the standard of proof is higher than in ordinary civil proceedings of a balance of probability.



45. The mischief that the law of contempt of court seeks to cure is deliberate disobedience of court orders. In the case of Samuel M. N. Mweru & Others v National Land Commission & 2 others [2020] KEHC 9233 (KLR) it was held that the breach complained of has to be both deliberate and mala fide.
46. The respondents who have appeared herein and the Interested Parties have raised the issue of there being a court order affecting the proceedings herein to the extent that they could not even respond thereto. Since the respondents failed to make available to this court the said conservatory orders this court now directs its Deputy Registrar (DR) to liaise with the DR Milimani Constitutional and HR division to assist in accessing the proceedings and/or orders, rulings and/or judgment in Nairobi HC, Milimani CHR Petition No. 329 of 2024 after which this court will issue further directions on the ruling in the present application.
47. Mention on 27th March 2026 before the Deputy Registrar of this court and on 22nd April 2026 before this court for further directions.
48. Orders accordingly.

**DELIVERED, DATED AND SIGNED AT KWALE ON THE VIRTUAL PLATFORM, TEAMS THIS 9TH DAY OF MARCH 2026.**

**ANDAYI W. F.**

**JUDGE**

In the presence of:

Applicant Mary Kalinga present on the virtual platform. N/A by counsel for the Appellant/Applicant.

N/A for the Respondents.

N/A for the IPs

Ummu: Court Assistant.

Signed by/for:

**HON. JUSTICE ANDAYI W.F.**

**KWALE HIGH COURT**

