

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
THE CIVIL APPELLATE DIVISION
(Coram: A.C. Mrima, J.)
CIVIL APPEAL NO. E712 OF 2024

-between-

ENG. KUNG’U NDUNG’U
.....APPLICANT

-versus-

- 1. MARKED KLAUSE LIMITED**
- 2. KENYA NATIONAL HIGHWAY AUTHORITY**
- 3. JOSEPH MWANGI GITHINJI**
- 4. DONALD OCHIENG**
- 5. JOSEPH KABURIA**
- 6. LUCY WANGARI**
- 7. THE ASSETS MANAGER
KENYA NATIONAL HIGHWAYS AUTHORITY.....
RESPONDENTS**

RULING

Background:

1. This ruling relates to a Notice of Motion dated 18th June 2024 which was filed by the Applicant herein, *Eng. Kung’u Ndung’u*. The application, which is subject of this ruling, emanates from *Milimani Commercial Magistrate’s Court Civil Case No. E5447 of 2022* [hereinafter referred to as **‘the suit’**] where *Marked Klasse Limited*, the 1st Respondent herein, sued *Kenya National Highways Authority*, the 2nd Respondent herein or *KeNHA*, seeking to restrain

it from interfering with its contractual obligations with the Nairobi City County regarding the management and installation of clocks on various roundabouts in Nairobi and its environs.

2. On 3rd August 2023, the trial Court issued temporary orders restraining the 2nd Respondent herein from interfering with the said contract. Subsequently, the 1st Respondent filed an application for contempt, alleging disobedience of the court orders. On 20th May 2024, the trial Court delivered a ruling, followed by an order on 4th June 2024, committing *Eng. Kung'u Ndung'u* (Director General of KeNHA) the Applicant herein, alongside the 3rd to 7th Respondents, to civil jail for six months for contempt. The Applicant was also directed to pay compensatory damages.
3. Aggrieved, the Appellant filed this appeal and the instant application which application was supported by the 2nd, 4th and 5th Respondents. Whereas *Joseph Kaburia*, the 5th Respondent, filed a Replying Affidavit, the 2nd, 4th and 5th Respondents filed joint written submissions to the application. The application was vehemently opposed by the 1st Respondent herein, *Marked Klasse Limited*.

The Application:

4. The application was brought under Sections 1A, 1B, 3 & 3A of the Civil Procedure Act and Order 42 Rules 6(6) and 8 of the Civil Procedure Rules and sought the following orders: -
 1. Spent.
 2. Spent
 3. *THAT the Honourable Court be and is hereby pleased to Order that, pending the hearing and determination of this application inter partes, and in light of the huge public interest in the matter, as well as apparent merit there be a stay of any further proceedings howsoever in MCCC No. E5447 of 2022 Marked Klasse Limited v Kenya National Highways Authority.*

4. *THAT the Honourable Court be and is hereby pleased to Order that, pending the hearing and determination of the Appeal herein, an ORDER OF INJUNCTION hereby issues restraining the enforcement, implementation, execution, operationalization and/or howsoever bringing into effect the whole of the Ruling of the Hon B. Cheloti, Principal Magistrate dated 20th May, 2024, the consequent Order dated 4th June, 2024, and all the proceedings in MCCC No. E5447 of 2022 thereon founded; and particularly in as far as the impugned decision seeks to commit the Appellant to civil jail for a period of six (6) months, and preliminary payment of compensation for unassessed and unproven special damages.*
 5. *THAT the Honourable Court be and is hereby pleased to Order that, pending the hearing and determination of the Appeal herein, and in light of the huge public interest in the matter, as well as apparent merit there be a stay of any further proceedings howsoever in MCCC No. E5447 of 2022 Marked Klasse Limited v Kenya National Highways Authority.*
 6. *The Hon Court be and is hereby pleased to award costs of the application herein on a full indemnity basis.*
5. In the grounds and affidavit in support of the application, the Applicant stated that he was a public officer acting in good faith, and thus protected from personal liability under Section 42 of the Kenya Roads Act. It was his case that he was not a party to the original suit, was never formally enjoined, and was condemned unheard in violation of the rules of natural justice and fair trial. He deposed that he stood to suffer irreparable loss of personal liberty through committal to civil jail if the preservatory orders were not granted. It was his position that the 1st Respondent confused and mistook him for KeNHA.

The Applicant's Submissions:

6. The Applicant filed written submissions dated 15th April 2025. It was his case that he had met the threshold for the grant of preservatory injunctive reliefs under *Order 42 Rules 6(6) and 8 of*

the *Civil Procedure Rules*. He argued that a strong *prima facie* case had been established because the trial Court condemned him unheard, breaching *Article 50* of the *Constitution*. He relied on the definition of a *prima facie* case in *Mrao Ltd -vs- First American Bank of Kenya Ltd & 2 others* [2003] KECA 175 (KLR). The Applicant further cited the case of *Republic -vs- Principal Secretary, Ministry of Defence ex parte George Kariuki Waithaka & another* [2021] eKLR and *Christine Wangari Gachege -vs- Elizabeth Wanjiru Evans & 11 others* [2014] eKLR to assert that contempt proceedings are quasi-criminal and the right to be heard before condemnation is mandatory.

7. Relying on *Andrew Mworu Kasaya -vs- Kenya Bus Services Limited* [2021] KEHC 9511 (KLR), the Applicant submitted that special damages must be pleaded and strictly proved, thus faulting the trial Court's preliminary award. Lastly, the Applicant invoked the intrinsic test of the lower risk of injustice as set out by *Prof J. B. Ojwang* in *Suleiman -vs- Amboseli Resort Limited* [2004] eKLR following *Film Rover International vs Cannon Film Sales Ltd* [1986], arguing that the balance of convenience tilted in his favour.
8. As pointed out earlier, the application was supported by the 2nd, 4th and 5th Respondent herein whose positions this Court will now look at.

The 5th Respondent's case:

9. *Joseph Kaburia*, swore a Replying Affidavit supporting the application. He deposed that he had never participated in the lower Court proceedings, had no knowledge of the suit and was shocked to discover that he had been condemned to civil jail unheard, and, in violation of his right to a fair trial.

The 2nd, 4th and 5th Respondents' joint written submissions:

10. The 2nd, 4th, and 5th Respondents joint written submissions were dated 25th April 2025. They all supported the application. They

maintained that they were strangers to the lower Court proceedings and were condemned without a hearing.

11. In relying on the principles in *Giella -vs- Cassman Brown & Co. Ltd* [1973] EA 358, they argued that a *prima facie* case had been established, that irreparable harm involving the loss of liberty was imminent, and that the balance of convenience favoured the grant of the injunction.

The 1st Respondent's case:

12. *Marked Klasse Limited*, challenged the application through the Replying Affidavit of *Benson Wagura Mathenge* deposed to on 29th July 2024. He deposed that the trial Court's restraining orders of 3rd August 2023 were clear, unambiguous, and binding. He averred that the Applicant was served on 10th August 2023 but deliberately breached the orders when his agents invaded the roundabouts, destroyed installations and arrested the 1st Respondent's workers. He deposed that the appeal was time-barred as it effectively challenged the 3rd August 2023 orders. He also contended that the Applicant had filed a similar application in the lower Court, amounting to an abuse of Court process.

The written submissions:

13. In its written submissions dated 13th February 2025, the 1st Respondent argued that the threshold for contempt was met as the Applicant had knowledge of the clear orders and wilfully disobeyed them. The 1st Respondent relied on the case of *Shimmers Plaza Limited -vs- National Bank of Kenya Limited* [2015] eKLR on the elements of civil contempt, and *Basil Criticos -vs- Attorney General & 8 Others* [2012] eKLR to argue that knowledge of a Court order supersedes personal service.

14. Citing the Court of Appeal authority in *Mutitika -vs- Baharini Farm Limited* [1985] KLR 227, it was its case that wilful disobedience was proved. It further referred to the case of *Teachers Service Commission -vs- Kenya National Union of Teachers & 2 Others* [2013] eKLR to emphasize that Court orders must be obeyed. The 1st Respondent contended that the Applicant failed to demonstrate substantial loss to warrant a stay under Order 42 Rule 6. To that end, it relied on the case of *Kenya Shell Limited -vs- Benjamin Karuga Kibiru & Another* [1986] KLR 410.
15. In conclusion, the 1st Respondent asserted that the application was an abuse of process as defined by the Court of Appeal in the case of *Muchanga Investments Ltd -vs- Safaris Unlimited (Africa) Ltd & 2 Others* [2009] eKLR.

Analysis and Determination:

16. Having carefully considered and appreciated the disputants' respective cases and arguments alongside the various decisions referred to, the main issue for determination is whether the application be allowed. To that end, this Court will address whether an interlocutory injunction be issued which issue will answer to whether the proceedings in the suit be stayed.
17. In ***Giella -vs- Cassman Brown & Co. Ltd*** (1973) E A 358 the Court of Appeal set forth foundational conditions for the grant of interlocutory injunction and observed thus: -

..... The conditions for the grant of an interlocutory injunction are now, I think, well settled in East Africa. First, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience.

18. The Court will hence interrogate the above conditions in *seriatim*:

[a] Prima-facie case:

19. In defining a *prima facie* case, the Court of Appeal in **Mrao Ltd - vs- First American Bank of Kenya Ltd & 2 others** [2003] KLR 125, stated as follows: -

..... A prima facie case... is a case which, on the material presented to the court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation.

20. The Applicant alongside the 2nd, 4th and 5th Respondents contended that they were condemned to civil jail without being formally joined to the suit or personally served. The issue, no doubt, is a substantial triable one that touches on the right to fair hearing, a right which is a constitutionally inalienable entitlement.

21. Speaking to the right to fair hearing, the Supreme Court in **Githiga & 5 others -vs- Kiru Tea Factory Company Ltd** (Petition 13 of 2019) [2023] KESC 41 (KLR) (16 June 2023) had the following to say: -

In a concurring opinion, Njoki Ndungu, SCJ in the decision of Evans Odhiambo Kidero & 4 others -vs- Ferdinand Ndungu Waititu & 4 others SC Petition No 18 of 2014 as consolidated with Petition No 20 of 2014 [2014] eKLR expounded on the right to fair hearing as follows:

(257) Fair hearing, in principle incorporates the rules of natural justice, which includes the concept of audi alteram partem (hear the other side or no one is to be condemned unheard) and nemo iudex in causa sua otherwise referred to as the rule against bias. Peter Kaluma, Judicial Review: Law, Procedure and Practice 2nd Edition (Nairobi: 2009) at page 195, notes that the rules of natural justice generally refer to procedural fairness in decision making. Further he analyses the two mentioned concepts of the rules of natural justice and states [at pages 176 and 177] that it is the duty of the courts, when dealing with individual cases, to

determine whether indeed the rules of natural justice have been violated and noting that “although the necessity of hearing is well established, its scope and contents remain unsettled.

22. Further, the Apex Court expressed itself on the right to a fair hearing in respect to contempt proceedings, as follows: -

..... Accordingly, Article 50(2) of the Constitution on the right to a fair trial imposes a duty on the Court to guarantee the parties to contempt proceedings procedural justice by evaluating the evidence brought forth by all parties. We note that, while there exists no fixed content to the duty to afford procedural fairness, the fairness of procedure depends on the nature of the matters in issue and that would constitute a reasonable opportunity for parties to present their cases in any given circumstance. Procedural fairness in the administration of justice involves the fair hearing rule and the rule against bias. The fair hearing rules require a decision maker to inter alia afford a person an opportunity to be heard before making any decision affecting his/her interests.

23. The pending appeal will eventually address the issue as to whether the right to a fair hearing was infringed. As such, the foregoing exposition leaves no doubt that the Applicant has established a *prima-facie* case.

[b] Irreparable Injury:

24. Irreparable injury in contempt proceedings is invariably linked to the deprivation of personal injury. In the ***Githiga & 5 others - vs- Kiru Tea Factory Company Ltd*** case (*supra*), the Supreme Court discussed the significance of personal liberty in the following terms;

..... Due to the quasi-criminal nature of contempt proceedings and the gravity of the consequences that flowed from contempt proceedings, Courts were required to adhere to the principles of natural justice, procedural fairness, and the right to a fair hearing. That was because, in contempt proceedings, the liberty of the subject was usually at stake, therefore, if a party alleged breaches of his fundamental rights and freedoms as envisaged under the Constitution albeit, at the Court of Appeal, the

Supreme Court could not afford to shut its eye to such serious legal issues that called for settling as the apex Court.

25. The Court of Appeal in **Alfred N. Mutua v Ethics & Anti-Corruption Commission (EACC) & 4 others** [2016] KECA 596 (KLR) spoke to how irreversible the harm occasioned to a person may be when deprived of personal liberty. The Learned Judges observed;

.... In further consideration of public interest in relation to the conservatory orders sought, we have evaluated the instant application in light of the submission that there is a real threat of arrest and prosecution of the applicant and that this is a threatened violation of his dignity and fundamental rights under the Constitution. Arrest leads to many serious consequences not only for the arrested individual but for his family, close relations and friends particularly as most people do not make any distinction between arrest at a pre-conviction or post-conviction stage. In our view, arrest should be the last option and should be restricted to those exceptional cases where arresting an individual is imperative in the facts and circumstances of the case. Personal liberty is a very precious fundamental right and should be curtailed only when it becomes imperative according to the peculiar facts and circumstances of the case. The importance of personal liberty as a fundamental right cannot be gainsaid; all other fundamental rights and freedoms cannot be enjoyed without life and liberty. Life bereft of liberty is without honour and dignity and loses significance and meaning and life itself would not be worth living; that is why liberty is the very quintessence of a civilized existence.

26. Flowing from the above, this Court is satisfied that imminent irreparable harm is likely to be visited upon the Applicant should he serve the prison term before the determination of the appeal, and more so, in the event the appeal succeeds.

[c] The balance of convenience:

27. In this case, the risk of an irreversible loss of liberty far outweighs the potential delay to the 1st Respondent. This Court is reminded of the Supreme Court decision in **Francis**

Karioko Muruatetu & another -vs- Republic [2017] eKLR where it was observed that the right to liberty is inextricably linked to the right access justice and fair trial. To deprive a person of their liberty without affording them the right to be heard is to violate the very essence of human dignity. The Court further observed as under: -

..... The scope of access to justice as enshrined in article 48 is very wide. Courts are enjoined to administer justice in accordance with the principles laid down under article 159 of the Constitution. Thus, with regards to access to justice and fair hearing, the State through the courts, ensures that all persons are able to ventilate their disputes. Access to justice includes the right to a fair trial. If a trial is unfair, one cannot be said to have accessed justice.

Disposition:

28. On the basis of the foregoing discussions, this Court finds merit in the application. Consequently, the following final orders hereby issue: -

- [a] An order of injunction hereby issues restraining the enforcement of the Ruling dated 20th May 2024 and the Order dated 4th June 2024 in *Milimani MCCC No. E5447 of 2022* pending the determination of this appeal.**
- [b] An order hereby issues staying further proceedings in *Milimani MCCC No. E5447 of 2022* pending the determination of this appeal.**
- [c] Costs of the application to abide the outcome of the appeal.**
- [d] This matter shall be fixed for directions before the Hon. Deputy Registrar, on a date to issue, towards the hearing of the appeal.**

Orders Accordingly.

DELIVERED, DATED and SIGNED at NAIROBI this 30th day of April, 2026.

A. C. MRIMA
JUDGE

Ruling virtually delivered in the presence of:

Mr. Mukathe, Learned Counsel for the 1st Respondent.

No appearance for the Appellant/Applicant.

Michael/Amina - Court Assistants.