



**Ndambiri & another v Nairobi Metropolitan Services & 6 others; Harambee Sacco & Co-operative Society Limited & 6 others (Interested Parties) (Environment & Land Petition E026 of 2022) [2024] KEELC 3285 (KLR) (25 January 2024) (Ruling)**

Neutral citation: [2024] KEELC 3285 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT & LAND PETITION E026 OF 2022  
OA ANGOTE, J  
JANUARY 25, 2024**

**BETWEEN**

**DAVID ALFRED NJERU NDAMBIRI ..... 1<sup>ST</sup> PETITIONER**

**TITUS KITONGA ..... 2<sup>ND</sup> PETITIONER**

**AND**

**NAIROBI METROPOLITAN SERVICES ..... 1<sup>ST</sup> RESPONDENT**

**LT. GEN MOHAMED BADI ..... 2<sup>ND</sup> RESPONDENT**

**STEPHEN GATHUITA MWANGI ..... 3<sup>RD</sup> RESPONDENT**

**STEPHEN MWADIME ..... 4<sup>TH</sup> RESPONDENT**

**RICHARD MUMO ..... 5<sup>TH</sup> RESPONDENT**

**FREDRICK OCHANDA ..... 6<sup>TH</sup> RESPONDENT**

**THE HON. ATTORNEY GENERAL ..... 7<sup>TH</sup> RESPONDENT**

**AND**

**HARAMBEE SACCO & CO-OPERATIVE SOCIETY LIMITED .... INTERESTED PARTY**

**SUSTAINABLE DEVELOPMENT SOLUTIONS LIMITED .... INTERESTED PARTY**

**ALI IBRAHIM HAMAMED ..... INTERESTED PARTY**

**AMEEY HOMES LIMITED ..... INTERESTED PARTY**

**ARCH. SALIM KOMORA ..... INTERESTED PARTY**

**ENG. WILSON LEPARTOBIKO ..... INTERESTED PARTY**



**RULING**

1. The application dated 14<sup>th</sup> June 2023 was filed by the Petitioners, and seeks the following orders:
  - a. That notice be issued to Patrick Analo Akivaga (County Secretary, Nairobi City County Government) (for 1<sup>st</sup> Respondent) Lt. Gen. Mohamed Badi (2<sup>nd</sup> Respondent), Stephen Gathuita Mwangi (3<sup>rd</sup> Respondent), Richard Mumo (5<sup>th</sup> Respondent), Fredrick Ochanda (6<sup>th</sup> Respondent), the Hon Attorney General (7<sup>th</sup> Respondent), George Onchiri (CEO Harambee Co-operative Society Limited (for 1<sup>st</sup> Interested Party), Stella Nyamu (Secretary, Sustainable Development Solutions Limited) (for 2<sup>nd</sup> Interested Party), Ali Ibrahim Hamamed (3<sup>rd</sup> Interested Party), Yusuf Asker Mohamed (Director and shareholder, Aamey Homes Limited) (for 4<sup>th</sup> Interested Party), Arch. Salim Komora (5<sup>th</sup> Interested Party), Eng. Wilson Lepartobiko (6<sup>th</sup> Interested Party) and Burach Koch (Koch Construction Limited) (for 7<sup>th</sup> Interested Party) to attend court to show cause why they should not be personally, jointly and severally found and held guilty, and to be sentenced for their failure, refusal and/ or neglect to obey the Honourable Court's order given on 25<sup>th</sup> May 2023 in ELC Petition No. E026 of 2022 David Alfred Njeru Ndambiri & Another v Nairobi Metropolitan Services & 13 others, contrary to Section 29 of the [Environment and Land Court Act](#).
  - b. That Patrick Analo Akivaga (County Secretary, Nairobi City County Government) (for 1<sup>st</sup> Respondent). Lt. Gen. Mohamed Badi (2<sup>nd</sup> Respondent), Stephen Gathuita Mwangi (3<sup>rd</sup> Respondent), Richard Mumo (5<sup>th</sup> Respondent), Fredrick Ochanda (6<sup>th</sup> Respondent), the Hon Attorney General (7<sup>th</sup> Respondent), George Onchiri (CEO Harambee Co-operative Society Limited (for 1<sup>st</sup> Interested Party), Stella Nyamu (Secretary, Sustainable Development Solutions Limited) (for 2<sup>nd</sup> Interested Party), Ali Ibrahim Hamamed (3<sup>rd</sup> Interested Party), Yusuf Asker Mohamed (Director and shareholder, Aamey Homes Limited) (for 4<sup>th</sup> Interested Party), Arch. Salim Komora (5<sup>th</sup> Interested Party), Eng. Wilson Lepartobiko (6<sup>th</sup> Interested Party) and Burach Koch (Koch Construction Limited) (for 7<sup>th</sup> Interested Party) be found and held guilty for refusing, failing or neglecting to obey the Honourable Courts orders given on 25<sup>th</sup> May 2023 in ELC Petition No. E026 of 2022 David Alfred Njeru Ndambiri & Another v Nairobi Metropolitan Services & 13 others, contrary to Section 29 of the [Environment and Land Court Act](#) and sentenced accordingly.
  - c. In the alternative and without prejudice to prayers 2 and 3, that Patrick Analo Akivaga (County Secretary, Nairobi City County Government) (for 1<sup>st</sup> Respondent). Lt. Gen. Mohamed Badi (2<sup>nd</sup> Respondent), Stephen Gathuita Mwangi (3<sup>rd</sup> Respondent), Richard Mumo (5<sup>th</sup> Respondent), Fredrick Ochanda (6<sup>th</sup> Respondent), the Hon Attorney General (7<sup>th</sup> Respondent), George Onchiri (CEO Harambee Co-operative Society Limited (for 1<sup>st</sup> Interested Party), Stella Nyamu (Secretary, Sustainable Development Solutions Limited) (for 2<sup>nd</sup> Interested Party), Ali Ibrahim Hamamed (3<sup>rd</sup> Interested Party), Yusuf Asker Mohamed (Director and shareholder, Aamey Homes Limited) (for 4<sup>th</sup> Interested Party), Arch. Salim Komora (5<sup>th</sup> Interested Party), Eng. Wilson Lepartobiko (6<sup>th</sup> Interested Party) and Burach Koch (Koch Construction Limited) (for 7<sup>th</sup> Interested Party) be personally, jointly and severally found and held to be in contempt of an in deliberate and willful disregard and



disobeyance of the Court order orders given on 25<sup>th</sup> May 2023 in ELC Petition No. E026 of 2022 David Alfred Njeru Ndambiri & Another v Nairobi Metropolitan Services & 13 others.

- d. That Patrick Analo Akivaga (County Secretary, Nairobi City County Government) (for 1<sup>st</sup> Respondent), Lt. Gen. Mohamed Badi (2<sup>nd</sup> Respondent), Stephen Gathuita Mwangi (3<sup>rd</sup> Respondent), Richard Mumo (5<sup>th</sup> Respondent), Fredrick Ochanda (6<sup>th</sup> Respondent), the Hon Attorney General (7<sup>th</sup> Respondent), George Onchiri (CEO Harambee Co-operative Society Limited (for 1<sup>st</sup> Interested Party), Stella Nyamu (Secretary, Sustainable Development Solutions Limited) (for 2<sup>nd</sup> Interested Party), Ali Ibrahim Hamamed (3<sup>rd</sup> Interested Party), Yusuf Asker Mohamed (Director and shareholder, Aamey Homes Limited) (for 4<sup>th</sup> Interested Party), Arch. Salim Komora (5<sup>th</sup> Interested Party), Eng. Wilson Lepartobiko (6<sup>th</sup> Interested Party) and Burach Koch (Koch Construction Limited) (for 7<sup>th</sup> Interested Party) be each committed to civil jail for such periods of time that this Honourable Court may find just and equitable for their deliberate and in willful disregard and disobeyance of the Court order given on 25<sup>th</sup> May 2023 in ELC Petition No. E026 of 2022 David Alfred Njeru Ndambiri & Another v Nairobi Metropolitan Services & 13 others.
  - e. That this Honourable Court makes such other and further orders that will meet the ends of justice and to ensure obedience of the court orders given on 25<sup>th</sup> May 2023 in ELC Petition No. E026 of 2022 David Alfred Njeru Ndambiri & Another v Nairobi Metropolitan Services & 13 others.
  - f. That costs of this application be provided for.
2. The application is supported by an Affidavit sworn by David Alfred Njeru Ndambiri, the 1<sup>st</sup> Petitioner, who deposed that on 25<sup>th</sup> May 2023, this court delivered a ruling on the Petitioner's Notice of Motion application dated 22<sup>nd</sup> June 2022 and that the court issued orders of temporary injunction compelling the 1<sup>st</sup>-7<sup>th</sup> Respondents to stop and enforce any further development on the suit property by the 1<sup>st</sup>-5<sup>th</sup> Interested parties, pending the hearing and determination of the Petition.
  3. It was deposed that the said order and penal notice dated 30<sup>th</sup> May 2023 were served upon the 1<sup>st</sup>-7<sup>th</sup> Respondents and the 1<sup>st</sup>-5<sup>th</sup> Interested parties and that the order and penal notice were also pasted and affixed at the entrance of the suit property but were immediately and forcefully removed by the Interested Parties and/or their servants and agents.
  4. Mr. Ndambiri deposed that despite being duly served with the said order and penal notice, the Respondents have personally, jointly and/or severally refused, failed and/or neglected to obey the court order by stopping and enforcing any further development on the suit property by the 1<sup>st</sup>-5<sup>th</sup> Interested parties.
  5. According to the 1<sup>st</sup> Petitioner, further development and construction on the suit property has been and continues being undertaken by the 1<sup>st</sup>-5<sup>th</sup> Interested Parties, their servants and/or agents and other persons and that the construction includes construction of another level and partitioning of the building structure into various residential apartment units and other facilities.
  6. The 1<sup>st</sup> Petitioner averred that on 5<sup>th</sup> June 2023, at about 2pm, officers from the Nairobi City County Government visited the development site and failed to stop the ongoing construction work neither did they enforce the court order against the persons undertaking the enjoined activities.
  7. It was deposed that on 6<sup>th</sup> June 2023, tens of workers were on site together with vehicles depositing building materials, as captured in various photographs before this court, undertaking such activities



- beyond the licensed hours and that there is no indication that the Respondents are interested in stopping the on-going development and construction activities in enforcing the court order given on 25<sup>th</sup> May 2023.
8. It is the 1<sup>st</sup> Petitioner's deposition that the Respondents are instead abetting the Interested Parties to continue with the construction activities on the suit property, further infringing and violating the Applicants' rights and fundamental freedom to a clean and healthy environment.
  9. The 1<sup>st</sup>-6<sup>th</sup> Respondents opposed the application through a Replying Affidavit dated 13<sup>th</sup> July 2023 and sworn by Mr. Stephen Gathuita Mwangi, the County Executive Committee Member for Built Urban Planning for Nairobi County and the 3<sup>rd</sup> Respondent.
  10. The County Executive Committee Member for Built Urban Planning for Nairobi County, Stephen Gathuita Mwangi, deponed that they received the orders of this court relating to the construction on LR No. 209/7549 and that they have perused the documents relating to the construction and found that the ongoing construction had all the requisite developments permission.
  11. Mr. Gathuita Mwangi deponed that on 21<sup>st</sup> June 2023, they made a visit at the construction site and confirmed that construction on the site was stopped and that there was no ongoing construction on the said date. He averred that they have taken all necessary steps to comply with the order and ensure compliance with the same; that they are not aware of any ongoing construction on the site and that this application is premature and a misuse of the court process as the Petitioners have not brought to their attention that there is ongoing construction.
  12. The 1<sup>st</sup> Interested Party opposed the application vide a Replying Affidavit dated 5<sup>th</sup> July 2023 and sworn by Dr. George Ochiri, the 1<sup>st</sup> Respondent's Chief Executive Officer. Mr. Ochiri deponed that he was notified by his advocates concerning the orders dated 25<sup>th</sup> May 2023, and was subsequently served with the orders and penal notice by the Petitioners' advocate.
  13. He deponed that the 1<sup>st</sup> Interested Party through its agents has not disobeyed the court orders directly or indirectly; that following the transfer of the suit property to the 2<sup>nd</sup> Interested Party, the land does not belong to the 1<sup>st</sup> Interested Party and that the 1<sup>st</sup> Interested Party has been wrongly enjoined as an Interested Party having relinquished its rights and interests after transfer of the suit property.
  14. The 3<sup>rd</sup> Interested Party opposed the application vide a Replying Affidavit dated 20<sup>th</sup> July 2023 and sworn by Ali Ibrahim Hamamed, who deponed that he is aware of the orders of this court issued on 25<sup>th</sup> May 2023, and that upon service of the order and the penal notice, he has not undertaken or directed to be undertaken on the suit property any construction or further development works on the property.
  15. The 3<sup>rd</sup> Interested Party deponed that the Petitioners' exhibits DANN-7-10, DANN-13 and DANN-15, and the alleged video clips have been doctored and fixed to fit a certain narrative; that the photographic evidence should be struck out because the photographs are more prejudicial than probative because they cannot interrogate the entire video, its storage, its transmission, the printer and the computer and that there is no proper time and date stamp.
  16. According to the 3<sup>rd</sup> Interested Party, the photos and video are secondary evidence alleged to be small pieces of what is said to be CCTV footage spanning 9 days and that the visibility is questionable. Mr. Hamamed deponed that the WhatsApp messages marked DANN-2 do not show who the sender is nor how they purported to make such statements.
  17. Mr. Hamamed stated that since this suit was instituted and after the orders dated 25<sup>th</sup> May 2023 were made, the 1<sup>st</sup> Petitioner has been asking for money in exchange for withdrawing this suit, which matter has been reported at Parklands Police Station.



18. The 4<sup>th</sup> Interested Party, Aamey Homes Ltd, filed a Replying Affidavit dated 21<sup>st</sup> July 2023, sworn by its director, Yusuf Asker Mohamed, who admitted that the 4<sup>th</sup> Interested Party is a developer undertaking construction works on the suit property.
19. While acquiescing that he is aware of the orders of this court issued on 25<sup>th</sup> May 2023, he denied undertaking any further development works on the suit property since 25<sup>th</sup> May 2023 and that the photographs produced as exhibits have been doctored and forged to extort money from the developer in exchange of dropping the Notice of Motion dated 14<sup>th</sup> June 2023 against the Developer.
20. It was deposed that the alleged video clips in the supplementary affidavit are a forgery, non-existent and concocted to mislead this court and should be struck out and that the 1<sup>st</sup> Petitioner has directly and indirectly approached the deponent and demanded for Kshs. 5 million in exchange of withdrawing the suit together with the Notice of Motion of 14<sup>th</sup> June 2023.
21. A Replying Affidavit by Edwin Odhiambo, a mason employed by the 3<sup>rd</sup> and 4<sup>th</sup> Interested Parties, sworn on 11<sup>th</sup> July 2023 was filed. Mr. Odhiambo deposed that on 25<sup>th</sup> May 2023, at about 1530Hours, the 4<sup>th</sup> Interested Party ordered them to stop the ongoing works on the suit property; that his employer informed him that this court ordered stoppage of all construction workers and that he and 177 other employees were ordered not to report to work until further notice.
22. Mr. Odhiambo deposed that since 25<sup>th</sup> May 2023, the suit property remains locked and there has been no further development. He deposed that the photos and videos submitted by the Petitioners are a forgery.
23. In response, the 1<sup>st</sup> Petitioner/Applicant swore two Further Affidavits on 30<sup>th</sup> June 2023 and 17<sup>th</sup> November 2023 in which he deposed that development and construction work has continued despite the order of the court and that the Petitioners have complained to NEMA through the letter dated DANN-1, demanding the Authority's intervention.
24. It was deposed that the construction is being undertaken despite claims that the 7<sup>th</sup> Interested Party left and abandoned the development project many years ago, raising concerns on the safety and security of the works being undertaken and that the Petitioner and co-residents wrote a letter to the National Construction Authority demanding legal and administrative action to be taken against the developer/ owner of the site.
25. The deponent averred that the development work being undertaken on the site was witnessed by himself and other residents and recorded via CCTV; that on several occasions, including on 5<sup>th</sup>, 21<sup>st</sup> and 29<sup>th</sup> June 2023, officers from the Nairobi City County Government visited the site but failed to stop the construction as shown in CCTV images and that the CCTV images made on 29<sup>th</sup> June 2023 show Nairobi County Government receiving money from the Interested Parties, their servants/agents and walking away from the site where construction was in full progress.
26. Mr. Ndambiri averred that he is the owner of the CCTV camera related gadgets and is the one who downloaded the video annexed to his Supporting Affidavits; that he downloaded and printed the CCTV camera recordings enumerated in the Certificate of Production of Electronic Evidence dated 3<sup>rd</sup> July 2023, annexed and marked DANN-1 and that the videos and pictures have not been doctored or forged.
27. He deposed that on 1<sup>st</sup> August 2023, the Petitioners engaged one Abednego Chacha to undertake an evidence gathering exercise; that the said Abednego Chacha carried out his work by observing and



taking down notes of the activities on the subject property, and taking photos of some of these activities and that he subsequently compiled a report of his exercise, which report is annexed as DANN-3.

28. It was the 1<sup>st</sup> Petitioner's deposition that the report showed that more than 100 people were engaged and employed to undertake construction work on the suit property between 1<sup>st</sup> and 23<sup>rd</sup> August 2023.
29. According to the 1<sup>st</sup> Petitioner, through a letter dated 14<sup>th</sup> August 2023, his advocates wrote to the Respondents and the Interested Parties and informed them of the on-going construction work and attached several photographs in support; that they gave details and particulars of vehicles supplying and delivering building materials and removing debris from the site and that no action has been taken nor response made by the Respondents or the Interested Parties.
30. The Applicant averred that the construction and development activities are being undertaken without the presence of a licensed contractor, architect and surveyor leading to a massive damage to the 2<sup>nd</sup> Petitioner's property and that on 16<sup>th</sup> November 2023, construction work being undertaken led to the collapse of the roof hoarding and caused massive damage to the 2<sup>nd</sup> Petitioner's properties, as shown in DANN-10.

### **Submissions**

31. Counsel for the Petitioners submitted that the law on contempt is concerned with maintenance of public confidence in the administration of justice by courts of law.
32. The Petitioners' Counsel submitted that Lt. General Mohamed Badi, Patrick Analo Akivaga, Stephen Gathuita Mwangi, Stephen Mwadime, Richard Mumo and Fredrick Ochanda were all senior officers at Nairobi Metropolitan Services when this Petition was instituted.
33. It was submitted that save for Lt. General Mohamed Badi, these are all senior officers with the Nairobi City County's Built Environment and Urban Planning Sector whose functions reverted back to the County from NMS. Counsel attached Executive Order No. 1 by the Governor Nairobi City County, which confirms that the senior officials are officers in the said sector.
34. Counsel submitted that Mr. George Ochiri is the Chief Executive Officer of the 1<sup>st</sup> Interested Party; Stella Nyamu is the Secretary of the 2<sup>nd</sup> Interested Party; Ali Ibrahim Hamamed is a director of the 2<sup>nd</sup> Interested party and Yusuf Asker Mohamed is the director of the 4<sup>th</sup> Interested Party.
35. The Petitioners' Counsel submitted that none of the Respondents and Interested Parties have disputed or denied service of the Order and Penal Notice; that the Respondents have deliberately failed to obey the court order from the date the said order was issued and served, up to and including the date of the submissions and that the 1<sup>st</sup> Petitioner in his affidavits has stated that he personally saw and witnessed the ongoing construction work.
36. Counsel submitted that the 1<sup>st</sup> Petitioner recorded the on-going activities using his phone and CCTV cameras to capture the activities; that he downloaded and printed the photos and videos recorded by the said cameras and that the affidavit of service sworn by Elvis Muthoka marked as DANN-14 stated that when he visited the suit property on 13<sup>th</sup> June 2023, he witnessed construction work going on and took photos of vehicles delivering construction materials.
37. Counsel submitted that the applicants have proved that the 1<sup>st</sup>- 6<sup>th</sup> Respondents and the 1<sup>st</sup>-5<sup>th</sup> Interested Parties have committed civil contempt and must be punished for their acts. They relied on the cases of Samuel M.N. Mweru & Others vs National and Commission & 2 Others (2020) eKLR, North Tetu Farmers Co. Ltd vs Joseph Nderitu Wanjohi (2016) eKLR and Mutikika vs Baharini Farm (1985) KLR 229 at 234.



38. It was their submission that the standard of proof in contempt proceedings is higher than the standard in civil proceedings, which is on a balance of probabilities.
39. Counsel's submission was that the Applicants are well aware that the Respondents are not in violation of the court's orders and have resorted to adducing doctored evidence, which is secondary evidence whose author cannot be ascertained and that there is no witness who was present to be cross-examined on the contents thereof.
40. They submitted that the evidence produced by the Petitioners is secondary evidence which has been produced without notice and is therefore inadmissible before the court, and ought to be struck out. Counsel relied on the case of *Jemima Moraa Sobu vs Trans National Bank Ltd* (2016) eKLR which tackled the issue of production of secondary evidence.
41. They added that the Applicants have further attempted to extort money from the 2<sup>nd</sup> and 3<sup>rd</sup> Interested parties in exchange of dropping this suit, which complaint is being handled by the EACC.
42. According to Counsel, this application is an abuse of the court process as it contains falsehoods and ought to be struck out under Order 2 Rule 15 of the Civil Procedure Rules.

### **Analysis and Determination**

43. Having considered the applications, the issue for this court's determination is as follows:
  - a. Whether the Respondents and the Interested Parties are in contempt of the orders dated 25<sup>th</sup> May 2023.
44. The power of a court to hold a party in contempt is for the purpose of upholding the rule of law. That is what was stated in *Teachers Service Commission vs Kenya National Union of Teachers & 2 Others*[2013] eKLR:
 

“The reasons why the Courts will punish for contempt of Court then is to safeguard the rule of law which is fundamental in the administration of justice. It has nothing to do with the integrity of the judiciary or the Court or even the personal ego of the presiding judge...it is about preserving and safeguarding the rule of law.”
45. Under Section 29 of the *Environment and Land Court Act*, the Environment and Land Court has been expressly clothed with jurisdiction to punish for contempt of court. This is in concurrence with Section 5 (1) of the *Judicature Act* that vests in the superior courts the power, like those of the High Court of Justice in England, to punish any party who violates its orders.
46. Section 29 of the *Environment and Land Court Act* prescribes that it is an offence to refuse, fail or neglect to obey an order or direction of the court given under the Act. The section reads as follows:
 

“Any person who refuses, fails or neglects to obey an order or direction of the Court given under this Act, commits an offence, and shall, on conviction, be liable to a fine not exceeding twenty million shillings or to imprisonment for a term not exceeding two years, or to both.”
47. It is notable that the standard of proof in contempt matters is higher than that of ordinary civil matters. In the case of *Mutitika vs 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."

48. This then means that the violation for which an alleged contemnor is cited must not only be precisely defined, but also be proved to a standard which is higher than proof on a balance of probabilities, but not as high as proof beyond reasonable doubt.

49. This court in *Sheila Cassatt Issenberg & Another vs Antony Machatha Kinyanjui* [2021] eKLR, citing *Carey vs Laiken*, 2015 SCC 17 (16th April 2015), where Cromwell J, writing for the Supreme Court of Canada 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."

50. In a similar vein, in *North Tetu Farmers Company Ltd vs Joseph Nderitu Wanjohi* [2016] eKLR, the court relied on the text titled 'Contempt in Modern New Zealand' which provides 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."

51. In this case, there is no contention that the orders dated 25<sup>th</sup> May 2023 were clear and unambiguous. This court issued an order of temporary injunction compelling the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup> and 7<sup>th</sup> Respondents jointly and severally to stop and to enforce any further development on L.R. No. 209/7549 City Park Drive Parklands by the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Interested Parties, their agents and/or servants or any other person pending the hearing and determination of this Petition.



52. In addition, the Respondents and the Interested Parties have all conceded that the order and penal notice were duly served upon themselves. They thereby had knowledge and proper notice of the terms of the subject order.
53. The Petitioners argue that the Interested Parties have continued development of the suit property against the orders of the court and that the Respondents have refused and/or neglected to enforce the orders of the court. The Petitioner has annexed photographs which he avers prove that the development works are ongoing, and that despite visits from officials from Nairobi City County, the Respondents have failed to stop the construction works.
54. The Petitioners have also presented an Affidavit of Service sworn by Elvis Muthoka dated 13<sup>th</sup> June 2023, who deposed that construction activities were ongoing on the suit property. He annexed photographs of himself affixing the notice and another photograph with the notice in the background, which also show construction workers on site.
55. Lastly, the Petitioner has included the affidavit of one Abednego Chacha, who undertook an evidence-gathering exercise by taking down notes and photographs, which were compiled into a report that has been presented by the Petitioners.
56. The Interested Parties have denied that any construction works are ongoing and claim that the photographs presented by the Petitioners are a forgery. The 3<sup>rd</sup> Respondent argued that the photographic evidence should be struck out because the photographs are more prejudicial than probative because they cannot interrogate the entire video, its storage, its transmission, the printer and the computer; that there is no proper time and date stamp; and that according to the best evidence rule, the photos and video are secondary evidence.
57. To buttress their position, the 4<sup>th</sup> Interested Party annexed two photographs marked YA1 dated 26<sup>th</sup> June 2023 which purport to show that construction and development works on the site had ceased. The 3<sup>rd</sup> Interested Party similarly annexed two photographs marked AI-1 which purport to show that construction had ceased on 1<sup>st</sup> June 2023 and on 11<sup>th</sup> July 2023.
58. The 1<sup>st</sup> Petitioner deponed that the photographs and the videos are electronic evidence, from his CCTV camera, which he downloaded and printed himself.
59. The law on admissibility of electronic and digital evidence is provided for under Section 75A of the [Evidence Act](#) as follows:
  - “(1) In any legal proceedings, electronic messages and digital material shall be admissible as evidence.
  - (2) The court shall not deny admissibility of evidence under subsection (1) only on the ground that it is not in its original form.
  - (3) In estimating the weight, if any, to be attached to electronic and digital evidence, under subsection (1), regard shall be had to—
    - (a) the reliability of the manner in which the electronic and digital evidence was generated, stored or communicated;
    - (b) the reliability of the manner in which the integrity of the electronic and digital evidence was maintained;



- (c) the manner in which the originator of the electronic and digital evidence was identified; and
  - (d) any other relevant factor.
- (4) Electronic and digital evidence generated by a person in the ordinary course of business, or a copy or printout of or an extract from the electronic and digital evidence certified to be correct by a person in the service of such person, is on its mere production in any civil, criminal, administrative or disciplinary proceedings under any law, the rules of a self-regulatory organization or any other law or the common law, admissible in evidence against any person and rebuttable proof of the facts contained in such record, copy, printout or extract.”
60. Section 106B of the *Evidence Act* prescribes that admissibility of electronic evidence is upon the satisfaction of the conditions set out in the section, without further proof or production of the original, as evidence of any contents of the original.

“ 106B. Admissibility of electronic records.

- (1) Notwithstanding anything contained in this Act, any information contained in an electronic record which is printed on a paper, stored, recorded or copied on optical or electro-magnetic media produced by a computer (herein referred to as "computer output") shall be deemed to be also a document, if the conditions mentioned in this section are satisfied in relation to the information and computer in question and shall be admissible in any proceedings, without further proof or production of the original, as evidence of any contents of the original or of any fact stated therein where direct evidence would be admissible.
- (2) The conditions mentioned in subsection (1), in respect of a computer output, are the following—
  - (a) the computer output containing the information was produced by the computer during the period over which the computer was used to store or process information for any activities regularly carried out over that period by a person having lawful control over the use of the computer;
  - (b) during the said period, information of the kind contained in the electronic record or of the kind from which the information so contained is derived was regularly fed into the computer in the ordinary course of the said activities;
  - (c) throughout the material part of the said period, the computer was operating properly or, if not, then in respect of any period in which it was not operating properly or was out of operation during that part of the period, was not such as to affect the electronic record or the accuracy of its content; and
  - (d) the information contained in the electronic record reproduces or is derived from such information fed into the computer in the ordinary course of the said activities.
- (3) ...



- (4) In any proceedings where it is desired to give a statement in evidence by virtue of this section, a certificate doing any of the following—
- (a) identifying the electronic record containing the statement and describing the manner in which it was produced;
  - (b) giving such particulars of any device involved in the production of that electronic record as may be appropriate for the purpose of showing that the electronic record was produced by a computer;
  - (c) dealing with any matters to which conditions mentioned in subsection (2) relate; and
  - (d) purporting to be signed by a person occupying a responsible position in relation to the operation of the relevant device or the management of the relevant activities (whichever is appropriate), shall be evidence of any matter stated in the certificate and for the purpose of this subsection it shall be sufficient for a matter to be stated to be the best of the knowledge of the person stating it.”

61. Mr. Hamamed for the 3<sup>rd</sup> Interested Party has argued that the photographic evidence produced by the Petitioner does not conform to the best evidence rule as it is secondary evidence. However, Section 106B(1) of the *Evidence Act* prescribes that electronic evidence shall be admissible if it satisfies the conditions set out in Section 106B and shall be taken as evidence of any contents of the original.
62. One of the conditions under Section 106B is the production of a certificate which should satisfy the court as to the reliability and validity of the electronic evidence. A similar certificate is required under Section 65(8) of the *Evidence Act*, which is with respect to admissibility of computer print-outs.
63. The contents of this certificate was interrogated by the court in *Idris Abdi Abdullahi v Ahmed Bashane & 2 Others* [2018] eKLR as follows:

“From the above legal provisions, and cited authorities by the Respondent, the law requires that Section 78 A and 106 B of the Act are read conjunctively and complied with. The CD video recording in this case is both an electronic record and provides electronic and digital evidence. Therefore, it ought to be produced with a certificate as provided by Section 106B of the Act, and fulfills the requirements of authenticity and validity of the information and/or evidence contained in the said CD video recording. The certificate shall contain information that complies with Section 78A(3) of the Act. The certificate shall provide vital information as to the source, process and delivery of the electronic record or evidence to the Court and parties so as to enable admission of the electronic record as evidence. The content of the certificate would aid and satisfy the court as to reliability of generation of the electronic record/evidence; the integrity of the process and the origin of the content.”

64. The 1<sup>st</sup> Petitioner in this case has annexed a Certificate of Production of Electronic Evidence under Section 65(8) and Section 106B(4) of the *Evidence Act*. In the certificate, he averred that on 2<sup>nd</sup> July 2023, he printed from the computer/ digital video recorder under his control recordings from his CCTV camera, taken between 5<sup>th</sup> June 2023 and 29<sup>th</sup> June 2023. He thereafter used a flash drive to copy the recordings and later transferred the recording onto a CD Drive which he presented.
65. He also stated that at the time of printing/copying the recordings, the computer/digital video recording device from which he copied them was regularly used to share and process information, and



he has lawful use of these devices; that the computer/digital video recorder was regularly used in the ordinary course of business and was supplied and stored with the kind of information generated from these devices, and that the electronic devices were operating properly and did not have defects that could affect the accuracy of the contents of the video footages.

66. Indeed, the Respondents and the Interested Parties did not see the need to have the 1<sup>st</sup> Petitioner summoned to be cross examined on the contents of his affidavits or certificate. To this end, this court is satisfied that the Petitioners met the conditions set out under Section 106B of the Evidence Act with respect to the videos produced. The Petitioners also produced photographs, some of which were processed from the CCTV videos.
67. While the Interested Parties have alleged that the photographs and videos produced by the Petitioners are forged, they have not pleaded the particulars of the forgery nor presented any evidence of the said forgery.
68. It is trite that where a party alleges forgery or fraud, the burden of proof required of such party is slightly higher than proof upon a balance of probabilities but not one beyond a reasonable doubt as in criminal cases. This was stated in Elizabeth Kamene Ndolo vs George Matata Ndolo [1996] eKLR. Similarly, in Vijay Morjaria vs Nansingh Madhusingh Darbar & Another [2000] eKLR, Tunoi JA held that:

“first, fraud must be specifically pleaded. Secondly, particulars of the fraud alleged must be stated on the face of the pleading. Third, the facts alleged to be fraudulent must of course be set out. Fourth, it must be expressly stated that these facts were done fraudulently. Fifth, fraudulent conduct must be distinctly alleged and as distinctly proved. Sixth, it is not allowable to leave fraud to be inferred from the facts.”
69. The Petitioners have presented multiple photographs marked DANN-3, DANN-5, DANN-6, DANN-8, DANN-9, DANN-10 and DANN-13 annexed to the affidavit dated 14<sup>th</sup> June 2023 and DANN-3, which is annexed to the Affidavit dated 30<sup>th</sup> June 2023.
70. Most of the photographs did not indicate the date on which they were taken. However, on the photographs marked DANN-3, annexed to the 1<sup>st</sup> Petitioner’s Affidavit dated 30<sup>th</sup> June 2023, they clearly indicate a date of 5<sup>th</sup> June 2023. The photograph shows a Nairobi City County Vehicle parked outside the development and County Officers visiting the said property. This establishes the Petitioners’ claim that the 1<sup>st</sup> Respondents’ officers indeed conducted a visit on the site on 5<sup>th</sup> June 2023.
71. The Affidavit of Service sworn by Elvis Muthoka on 14<sup>th</sup> June 2023 additionally establishes that on 13<sup>th</sup> June 2023, construction activities were ongoing on the suit property, contrary to the claims by the Interested Parties.
72. In his affidavit, Mr. Muthoka avers that he found several people busy with construction activities and vehicles were delivering building materials. Upon affixing copies of the order and penal notice at the site, he took photographs which he annexed to his affidavit. The photographs show Mr. Muthoka putting up the notice, and clearly show construction workers onsite and a vehicle. Neither the Respondents nor the Interested Parties have challenged this affidavit.
73. There is also the Affidavit sworn by Abednego Chacha and the annexed report that he prepared, which affidavit and report are marked DANN-3 and are annexed to the 1<sup>st</sup> Petitioner’s affidavit dated 17<sup>th</sup> November 2023.
74. In his Affidavit, Mr. Chacha depones that he was engaged by the Petitioners to observe and record the daily activities that took place on the suit property between 1<sup>st</sup> August 2023 and 23<sup>rd</sup> August 2023.



- He deponed that he observed and recorded a series of activities including movement of activities of tens of workers into the suit property, who worked between 7.30am and 5pm and supervisory visits conducted by several persons.
75. Abednego Chacha annexed a tabulated report which shows various activities that took place for 23 days in the month of August 2023. He also annexed photographs which showed vehicles visiting the development site and construction workers on site.
  76. The aforementioned affidavits and photographs establish to the satisfaction of this court that the 1<sup>st</sup> to 5<sup>th</sup> Interested Parties have been engaging in construction and development works on the suit property, in breach of the orders of this court dated 25<sup>th</sup> May 2023.
  77. As to the conduct of the Respondents, while they argued that the Petitioners have not given them any notice of the alleged continuing construction, the Petitioners have produced several letters addressed to the Respondents notifying them of the breach by the Interested Parties and urging their action in compliance with this court's order.
  78. For example, the Petitioners annexed a letter to the Respondents, the Interested Parties and their advocates, dated 7<sup>th</sup> June 2023 informing them that despite the order of this court dated 25<sup>th</sup> May 2023, development and construction activities were ongoing, in breach and violation of the court orders.
  79. The 1<sup>st</sup> Petitioner also annexed on his Further Affidavit dated 30<sup>th</sup> June 2023 a letter dated 27<sup>th</sup> June 2023 addressed to the National Environmental Management Authority, demanding that the Authority takes action against the owners and developers of the project for the continued construction in breach of the court order dated 25<sup>th</sup> May 2023.
  80. The 1<sup>st</sup> Petitioner also annexed a letter to the National Construction Authority dated 27<sup>th</sup> June 2023 complaining about the ongoing construction on the suit property. Therefore, the assertion by the Respondents that they were not made aware of the construction is not true.
  81. The upshot of the foregoing is that this court finds the Respondents, (except the 2<sup>nd</sup> and 7<sup>th</sup> Respondents), and the Interested Parties (except the 1<sup>st</sup> Interested Party) in contempt. However, before handing down any sanction (s) for the said disobedience, this Court will allow the named contemnors to offer mitigation prior to sentencing.
  82. The Petitioners' application dated 14<sup>th</sup> June 2023 therefore succeeds as follows:
    - a. Patrick Analo Akivaga (County Secretary, Nairobi City County Government) (for 1<sup>st</sup> Respondent), Stephen Gathuita Mwangi (3<sup>rd</sup> Respondent), Richard Mumo (5<sup>th</sup> Respondent), Fredrick Ochanda (6<sup>th</sup> Respondent), Stella Nyamu (Secretary, Sustainable Development Solutions Limited) (for 2<sup>nd</sup> Interested Party), Ali Ibrahim Hamamed (3<sup>rd</sup> Interested Party), Yusuf Asker Mohamed (Director and shareholder, Aamey Homes Limited) (for 4<sup>th</sup> Interested Party), Arch. Salim Komora (5<sup>th</sup> Interested Party), Eng. Wilson Lepartobiko (6<sup>th</sup> Interested Party) and Burach Koch (Koch Construction Limited) (for 7<sup>th</sup> Interested Party) be and are hereby found and held guilty for refusing, failing or neglecting to obey the Court's orders given on 25<sup>th</sup> May 2023.
    - b. The abovenamed contemnors to appear personally in this court for mitigation and sentencing.
    - c. The above named contemnors to pay the costs of the application.

**DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 25<sup>TH</sup> DAY OF JANUARY, 2024.**



**O. A. ANGOTE**

**JUDGE**

**In the presence of;**

Ms Kamigiche for Interested Party

Mr. Wageni for Petitioners

Mr. Abdullahi for Mr. Dayib for 1<sup>st</sup> – 6<sup>th</sup> Respondents

Ms Bashir for 2<sup>nd</sup> – 5<sup>th</sup> Interested Party

Court Assistant - Tracy

