



REPUBLIC OF KENYA



**KENYA LAW**  
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**Ogola v Paragon Electronics Limited & 2 others (Environment and Land Appeal E084 of 2021) [2024] KEELC 1173 (KLR) (29 February 2024) (Judgment)**

Neutral citation: [2024] KEELC 1173 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT AND LAND APPEAL E084 OF 2021  
OA ANGOTE, J  
FEBRUARY 29, 2024**

**BETWEEN**

**SAMUEL OWUOR OGOLA ..... APPELLANT**

**AND**

**PARAGON ELECTRONICS LIMITED ..... 1<sup>ST</sup> RESPONDENT**

**REMAX PROPERTY MANAGEMENT LIMITED ..... 2<sup>ND</sup> RESPONDENT**

**BLACK AND WHITE SECURITY LTD ..... 3<sup>RD</sup> RESPONDENT**

*(Being an Appeal against the Ruling and Order delivered on 29th October 2021 in the Chief Magistrates Court at Nairobi (Hon. D.O. Mbeja) in MCCC 9208/ 2019)*

**JUDGMENT**

1. The Appellant and the 3<sup>rd</sup> Respondent/Co-Appellant herein have filed two distinct appeals against the ruling delivered on 29<sup>th</sup> October 2021 in the Chief Magistrates Court at Nairobi (before Hon. D.O. Mbeja).
2. The Appellant has appealed against the lower court's ruling on the following grounds:
  - a. That the learned Magistrate erred in law by allowing the Application dated 19<sup>th</sup> November 2020 and failing to consider the wealth of evidence placed before it by the Appellant that there was no Order against the Appellant and therefore no contempt.
  - b. That the learned Magistrate failed to appreciate that there was clear evidence that the subject matter herein was regarding the management of sectional property and therefore under the *Sectional Properties Act*, 2020 and therefore the trial Court did not have jurisdiction to determine any matter before it.



- c. That the learned Magistrate erred in failing to appreciate the written submission of the Appellant and taking them into consideration.
  - d. That the learned Magistrate erred in failing to find that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents did not have any authority from the Management company i.e. owners of the apartments on the subject premises to file suit against any persons including one of the shareholders being the appellant herein.
  - e. That the learned Magistrate erred in law in finding that the evidence by the Plaintiff's Bernard Odityo in the Supporting Affidavit and the Supplementary Affidavit amounts to hearsay evidence.
  - f. That the learned Magistrate erred in finding that the Plaintiffs have met the threshold for contempt of court against the Appellant.
  - g. That the learned Magistrate erred in law by convicting the Appellant and without issuing the Appellant with a Notice to Show Cause is the practice and proceeded to sentence the Appellant without any mitigating factors.
  - h. That the learned Magistrate erred in finding that the prayers sought by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents were unattainable.
  - i. That the learned Magistrate erred in failing to find that the occurrence book was an issue pleaded in the Notice of Motion dated 19<sup>th</sup> November 2020.
3. The 3<sup>rd</sup> Respondent/Co-appellant has sought that the subject matter ruling be set aside on the following grounds:
- a. That the trial court erred in law and in fact by finding the "Defendants and all its officers" in contempt generally, without particularly and specifically naming the person in contempt.
  - b. That the trial court erred in law and in fact in finding that the "Defendants and all its officers" are in contempt, yet the Respondent did not prove the trite elements for grant of contempt orders.
  - c. That the trial court erred in law and in fact in holding that the "Defendants' and all its officers" are in contempt yet the Respondent did not prove who it exactly served with the impugned orders.
  - d. That the trial court erred in law and in fact in failing to appreciate the evidence and arguments put forth by the Appellant that the application by the Respondent was defective from the onset.
  - e. That the trial court erred in law and in fact in finding that the "Defendants and all its officers" are in contempt yet the Respondent failed to prove that the 'contemnors' were aware of the impugned court orders and whether they willfully disobeyed the same.
  - f. That the trial Court erred in law and in fact in failing to give priority to the Application dated 15<sup>th</sup> March 2021, by the Appellant herein, which sought to set-aside the Contempt Orders issued by the trial Court on 13<sup>th</sup> December 2019 and 7<sup>th</sup> October 2020.
  - g. That the trial court erred in law and in fact in failing to appreciate the fact that the Appellant's right to fair hearing was being violated when it failed to deal with the aforementioned application by the Respondent.



## The Appellant's Submissions

4. Counsel for the Appellant submitted that in contempt proceedings, the applicant bore the burden of proof, which in contempt proceedings, is higher than proof on a balance of probabilities.
5. Counsel submitted that the Appellant is not a party to the proceedings in the lower court, but as an advocate of the High Court, has been enjoined for contempt proceedings allegedly committed by his client and that on 11<sup>th</sup> November 2020, while visiting the apartments under the instructions of the 1<sup>st</sup> Plaintiff, he met a security guard who after introduction, the Appellant gave the said guard a copy of a court order.
6. The Appellant's Counsel submitted that the trial court was not seized of jurisdiction over the matter and therefore the proceedings in question should be deemed null and void ab initio and the subject orders be set aside ex debito justitiae and that the dispute emanates from management of a sectional title and in accordance with the Sectional Properties Act, it is the Environment and Land Court that had jurisdiction to adjudicate the dispute.
7. It was Counsel's submission that according to the Record of Appeal, no resolution of the 2<sup>nd</sup> Plaintiff management company was called to institute a suit against a member/shareholder, for which the Appellant had been sued for contempt.
8. It was Counsel's argument that the trial court erred in failing to find that the evidence by the Plaintiff's deponent, Bernard Odityo, was inadmissible for being hearsay evidence and that the unidentified guard in question was never summoned to provide testimony or to swear an affidavit to corroborate the events of 11<sup>th</sup> November 2020.
9. It was Counsel's submission that confusion has arisen between two suits which were heard by the same judicial officer: Milimani CMCC No. 9208 of 2015 Paragon Electronics Limited & Another vs Black and White Security Limited and Samuel Owour Ogolla and Milimani CMCC No. 1553 of 2020 Paragon Electronic Limited vs Christine Atieno Ochieng & Samuel Owour Ogola, which concerned parking of more than two vehicles in the suit property contrary to the license agreement.
10. It was submitted that the 1<sup>st</sup> Respondent has also instituted contempt proceedings of a similar nature in CMCC No. 1553 of 2020 against the Appellant's wife Christine and the co-Appellant herein in respect of a court order dated 13<sup>th</sup> December 2020 and that it is evident that there was confusion regarding the precise court order that the trial court order was addressing because no order of 13<sup>th</sup> December 2020 was issued in CMCC 9208 of 2019.
11. Counsel for the 3<sup>rd</sup> Respondent/Co-Appellant submitted that the trial court erred in finding that the 'Defendants and all its officers' are in contempt generally, without specifically naming the person in contempt and that contempt proceedings are quasi-criminal in nature and the orders citing a party for contempt must be directed at a person cited and be capable of enforcement without ambiguity.
12. Counsel submitted that the 3<sup>rd</sup> Respondent had initially appointed the firm of Morara & Ogola Advocates to represent it in CMCC No. 9208 of 2019 and subsequently, the firm of Sam Ogola & Company Advocates took over representation; that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents challenged the manner in which the firm of Sam Ogola & Co Advocates came on record for failure to file a notice of change of advocates and the court granted orders to expunge pleadings filed by the latter on the 3<sup>rd</sup> Respondent's behalf and that following the court's ruling on 7<sup>th</sup> October 2023, there was no advocate on record for the 3<sup>rd</sup> Respondent.



13. Counsel reiterated that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents instituted contempt proceedings alleging disobedience on the 3<sup>rd</sup> Respondent and its officers of the orders of 7<sup>th</sup> October and 13<sup>th</sup> December 2020; that no order purported to be enforced by the Respondents was attached to the application dated 19<sup>th</sup> November 2020; and that therefore, the ambiguity as to the order alleged by the Respondents must be resolved in the 3<sup>rd</sup> Respondent's favour.
14. It was submitted that the orders of 13<sup>th</sup> December 2019 lapsed on 7<sup>th</sup> October 2020 and the interim orders of 13<sup>th</sup> December 2019 were not available for enforcement, the same having lapsed when the court issued injunctive orders on 7<sup>th</sup> October 2020, until hearing and determination of the main suit; that in the absence of service of the said orders of 7<sup>th</sup> October, 2020 the 3<sup>rd</sup> Respondent cannot be cited for contempt of the impugned orders.
15. Counsel submitted that the trial court erred in condemning the 3<sup>rd</sup> Respondent's officers unheard and without affording them their inherent right to mitigate before sentencing. They relied on the Court of Appeal decision in Joseph Wambisi & 3 Others vs Trans Nzoia Investment Company Limited [2012] eKLR.
16. Counsel for the 1<sup>st</sup> and 2<sup>nd</sup> Respondents submitted that contrary to Order 42 of the Civil Procedure Rules, the Record of Appeal relied on by the Appellants is incomplete, as it does not contain the pleadings, certified copies of the order and ruling appealed from.
17. Counsel submitted that the 3<sup>rd</sup> Respondent's Appeal is defective as the cross-appeal procedure it has adopted was found to be defective and was rejected in the case of George Kianda & Another vs Judith Katumbi Kathenge & Another [2018] eKLR and that the 3<sup>rd</sup> Respondent want to conceal the mischief that the appeal was in fact out of time.
18. It was submitted by counsel for the 1<sup>st</sup> and 2<sup>nd</sup> Respondents that while granting leave to appeal, the lower court expressly stated that the leave to appeal was subject to the appeal being filed within 14 days and that the 3<sup>rd</sup> Respondent's Memorandum of Appeal was filed on 17<sup>th</sup> November 2021 and was therefore time barred.
19. The Respondents' Counsel submitted that the appeals herein arose from the lower court's ruling on two applications: the first was the 1<sup>st</sup> and 2<sup>nd</sup> Respondent's application dated 19<sup>th</sup> November 2021 which had sought orders to have the 3<sup>rd</sup> Respondent together with its directors and the Appellant cited for being in contempt of orders of the lower court made on 13<sup>th</sup> December 2019 and 7<sup>th</sup> October 2020 and that the second application was by the 3<sup>rd</sup> Respondent dated 15<sup>th</sup> March 2021 which had sought orders to have the lower court set aside its orders in respect of which they were being cited for contempt, that is the orders made on 13<sup>th</sup> December 2019 and 7<sup>th</sup> October 2020.
20. Counsel submitted that the lower court matter is a claim of trespass against the 3<sup>rd</sup> Respondent; that until 9<sup>th</sup> December 2019, the 3<sup>rd</sup> Respondent was represented in the lower court matter by Samuel Ogola as its advocate; that Samuel Ogola was at all material times also a resident of the suit property, occupying House B1-2, and that he had signed an agreement which ostensibly authorized the 3<sup>rd</sup> Respondent to trespass on the suit property.
21. It was submitted that Mr. Ogola had arrogated to himself a management role in the property by purporting to give instructions to the 3<sup>rd</sup> Respondent on whom to allow and not allow into the property; and had specifically given instructions that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents and their representatives should not be allowed unto the property.



22. Counsel submitted that simultaneously with the suit and soon thereafter, the 1<sup>st</sup> and 2<sup>nd</sup> Respondents filed applications dated 13<sup>th</sup> December 2019, 18<sup>th</sup> December 2019 and 17<sup>th</sup> January 2020; that arising from the application dated 13<sup>th</sup> December 2019, the lower court made interim orders restraining the 3<sup>rd</sup> Respondent from accessing and remaining on the suit property and that the 3<sup>rd</sup> Respondent was further restrained from preventing the 1<sup>st</sup> and 2<sup>nd</sup> Respondents' access to the suit property.
23. It was Counsel's submission that the 3<sup>rd</sup> Respondent and its officers disobeyed interim orders leading to the filing of the other two contempt and police assistance applications dated 18<sup>th</sup> December 2019 and 17<sup>th</sup> January 2020 respectively and that while the 3<sup>rd</sup> Respondent vigorously defended the three applications through the Appellant herein, the court in its ruling dated 7<sup>th</sup> October 2020 ordered that the 3<sup>rd</sup> Respondent and its agents grant to the 1<sup>st</sup> and 2<sup>nd</sup> Respondents access to the suit property and the 3<sup>rd</sup> Respondent be restrained from accessing, occupying, remaining on or occupying the suit property.
24. It was submitted by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents' advocate that the court cited the 3<sup>rd</sup> Respondent and its officers for contempt of the orders, having found them to have been duly served and having deliberately disobeyed the Court's earlier interim order of 13<sup>th</sup> December 2019.
25. Counsel submitted that due to the prevailing COVID pandemic at the time, the ruling was rendered on 7<sup>th</sup> October 2020 by email and sent to the parties' advocates including to Samuel Ogola and that Mr. Ogola or any of the 3<sup>rd</sup> Respondent's subsequent lawyers have never appealed against the ruling dated 7<sup>th</sup> October 2020.
26. Counsel submitted that on 11<sup>th</sup> November 2020, the 1<sup>st</sup> Respondent's representative Mr. Benard Okoti Odiyo went to the suit premises to carry out his duties and that on arrival, he noted that the 3<sup>rd</sup> Respondent's security guards were still on the property notwithstanding the court order dated 7<sup>th</sup> October 2020, which expressly ordered that the 3<sup>rd</sup> Respondent be restrained from accessing, remaining on and/or otherwise controlling or occupying, the suit property.
27. It was submitted that a representative of the 3<sup>rd</sup> Respondent, a security guard who refused to disclose his name, wore the 3<sup>rd</sup> Respondent's official uniform and that the said security guard refused to grant Benard Odiyo access to the suit property thereby blatantly disobeying the court's interim orders of 13<sup>th</sup> December 2020 and the final order of 7<sup>th</sup> October 2020.
28. Further, that the incident of 11<sup>th</sup> November 2020 led the 1<sup>st</sup> and 2<sup>nd</sup> Respondents to file another contempt application dated 19<sup>th</sup> November 2020, citing the 3<sup>rd</sup> Respondent and the Appellant for contempt.
29. According to the 1<sup>st</sup> and 2<sup>nd</sup> Respondents' counsel, in the defective affidavit filed on 21<sup>st</sup> September 2020, Mr. Ogola confirmed that he was at all material times aware of the two court orders which were the subject of the contempt application; that he also deposed that he was not a party to the suit and ought not to have been joined as a Respondent in the contempt application and that Mr. Ogola took the view that the Respondent's representative was not allowed into the property because they did not have a COVID Certificate, and appeared to impose a condition for compliance with an unequivocal court order.

### **Analysis and Determination**

30. Upon consideration of the pleadings and submissions of the parties to this appeal, the following issues arise for this court's determination:
  - a. Whether the Record of Appeal is defective;



- b. Whether the Co-Appellants' appeal is competent.
- c. Whether the trial court lawfully allowed the 1<sup>st</sup> and 2<sup>nd</sup> Respondents' contempt application;
31. The appeal herein challenges the interlocutory ruling by the Milimani Chief Magistrates Court at Nairobi (Hon. D.O. Mbeja) in MCCC 9208/ 2019 delivered on 29<sup>th</sup> October 2021. In the ruling, the lower court considered two applications: the first being a contempt application by the Plaintiffs/ 1<sup>st</sup> and 2<sup>nd</sup> Respondents dated 19<sup>th</sup> November 2021 and the second application was by the Defendant/ 3<sup>rd</sup> Respondent who sought to have themselves struck out of the proceedings.
32. The court allowed the Plaintiffs' application to hold the Defendant and the current Appellant in contempt and declined the Defendant's application to be struck out from the suit.
33. This being a first appeal, it is the duty of the Court to review the evidence adduced before the lower court and satisfy itself that the decision was well-founded. In *Selle & Another vs Associated Motor Boat Co. Ltd & Others* [1968] EA 123, this principle was enunciated thus:
- “...this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court ... is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect...”
34. The Appellant has rightly referred this court to the case of *China Zhongxing Construction Company Ltd vs Ann Akuru Sophia* [2020] eKLR, where the court further set out the standard of review for a first appellate court as follows:
- “From these cases, the appropriate standard of review to be established can be stated in three complementary principles:
- i. That on first appeal, the Court is under a duty to reconsider and re-evaluate the evidence on record and draw its own conclusions;
  - ii. That in reconsidering and re-evaluating the evidence, the first appellate court must bear in mind and give due allowance to the fact that the trial court had the advantage of seeing and hearing the witnesses testify before it; and
  - iii. That it is not open to the first appellate court to review the findings of a trial court simply because it would have reached different results if it were hearing the matter for the first time.”
35. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents' Counsel submitted that contrary to Order 42 of the Civil Procedure Rules, the Record of Appeal relied on by the Appellants is incomplete, as it does not contain the pleadings, certified copies of the order and ruling appealed from. Order 42 Rule 13(4) of the Civil Procedure Rules prescribes that the following documents should be part of the Record of Appeal:
- (a) the memorandum of appeal;
  - (b) the pleadings;
  - (c) the notes of the trial magistrate made at the hearing;
  - (d) the transcript of any official shorthand, typist notes electronic recording or palantypist notes made at the hearing;



- (e) all affidavits, maps and other documents whatsoever put in evidence before the magistrate;
- (f) the judgment, order or decree appealed from, and, where appropriate, the order (if any) giving leave to appeal.
36. The Record of Appeal filed by Appellant includes the Plaintiffs/ 1<sup>st</sup> and 2<sup>nd</sup> Respondent's application dated 19<sup>th</sup> November 2020; the Supporting Affidavit dated 19<sup>th</sup> November 2020 sworn by Benard Okoti Odityo; Supplementary Affidavit by Mr. Odityo dated 13<sup>th</sup> April 2021; Replying Affidavit sworn by Mohamud Ahmed Hassan, Operations Manager of the 3<sup>rd</sup> Respondent/ Co- Appellant dated 9<sup>th</sup> April 2021 and a Further Affidavit dated 13<sup>th</sup> July 2021.
37. The Record of Appeal also has the written submissions by the parties and the Ruling appealed against. To the extent that all the pleadings relating to the impugned application are in the Record of Appeal, including the Ruling of the lower court, which is the basis of this appeal, it is the finding of this court that the Record of Appeal is complete.
38. I say so because the appeal by the Appellant is in respect to two specific applications, which proceeded for hearing by way of written submissions. These applications are part of the Record of Appeal. No other proceedings were therefore necessary to enable this court determine if indeed the lower court erred in arriving at its decision of 29<sup>th</sup> October, 2021.
39. Although the Civil Procedure Rules obligates the Appellant to file a certified copy of the impugned Order and Ruling, a copy of a Ruling whose contents are not disputed by both parties suffices. Insisting on a certified copy of the Order and Ruling to be filed will be contrary to the provisions of Article 159 (2) (d) of *the Constitution* which requires justice to be administered without undue regard to procedural technicalities.
40. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents have argued that the 3<sup>rd</sup> Respondent has purported to also file an Appeal embedded herein by way of a Memorandum of Appeal dated 12<sup>th</sup> November 2021 which was in fact filed on 17<sup>th</sup> November 2021 and that the procedure adopted by the 3<sup>rd</sup> Respondent is totally defective.
41. The Appellant's Appeal is by way of Memorandum of Appeal dated 4<sup>th</sup> November 2021 while the 3<sup>rd</sup> Respondent's Appeal is by way of a Memorandum of Appeal dated 12<sup>th</sup> November, 2021. Both Memorandums of Appeal are challenging the decision of the lower court of 29<sup>th</sup> October, 2021.
42. This appeal was therefore commenced by the filing of the Memorandum of Appeal by the Appellant dated 4<sup>th</sup> November, 2021. The subsequent Memorandum of Appeal by the 3<sup>rd</sup> Respondent/Co-Respondent was embedded in the already existing appeal which is unprocedural.
43. Indeed, the procedure adopted by the 3<sup>rd</sup> Respondent in filing what it considers a cross appeal was rejected by Odunga J (as he was then) in the case of *George Kianda & Another vs Judith Katumbi Kathenge & Another* [2018] eKLR as follows:
- “Secondly, this Court is not aware of a procedure for filing of a cross-appeal in this Court as opposed to the Court of Appeal. The known procedure, in the absence of an express provision dealing with cross-appeals in the High Court, is however for each party to file separate appeals and apply for their consolidation.”
44. The 3<sup>rd</sup> Respondent/co-appellant should have filed a distinct appeal and apply for consolidation of the two. In fact, it is not true that the 3<sup>rd</sup> Respondent was out of time when it filed its Memorandum of Appeal on 17<sup>th</sup> November, 2021.



45. Under the provisions of section 79G of the *Civil Procedure Act*, the Appellant had 30 days to file its Memorandum of Appeal from the date of the Ruling and not 14 days as argued by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents, or as directed by the lower court.
46. Having found that it was unlawful for the 3<sup>rd</sup> Respondent to file the Memorandum of Appeal dated 12<sup>th</sup> November, 2021 within an already existing appeal, it is the finding of this court that the said Memorandum of Appeal is defective and cannot form part of the appeal filed by the Appellant. The said Memorandum of Appeal is struck out to the extent that it is defective.
47. The Appellant has argued that the learned Magistrate erred in law in finding that the evidence by the Plaintiff's Bernard Odityo in the Supporting Affidavit and the Supplementary Affidavit amounts to hearsay evidence; and that the learned Magistrate erred in finding that the Plaintiffs had met the threshold for contempt of court against him.
48. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents have submitted that this court does not have jurisdiction to deal with appeals from the magistrates arising out of contempt applications. According to counsel, the contempt proceedings are criminal in nature, and what is pending before this court is a criminal appeal.
49. Contempt proceedings are not criminal in nature. Contempt proceedings have been described as quasi-criminal in nature, whose standard of proof is neither that of civil proceedings nor criminal proceedings. Indeed, under section 20 of the *Environment and Land Court Act*, this court has the original jurisdiction to punish parties who act contrary to its orders.
50. That being the case, it follows that this court has jurisdiction to deal with appeals arising from contempt proceedings emanating from the lower court and tribunals in respect of all matters falling within its jurisdiction. The objection by the Respondents on the issue of jurisdiction therefore fails.
51. The elements for civil contempt were laid down in the case of *North Tetu Farmers Co. Ltd vs Joseph Nderitu Wanjohi* [2016] eKLR, where the court relied on the text titled 'Contempt in Modern New Zealand':
 

“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.”
52. As stated above, the Appellant has included a copy of the order dated 13<sup>th</sup> December 2019 in the Record of Appeal, which granted interlocutory injunction pending inter partes hearing of the application for injunctive orders.
53. The Appellant has also annexed a copy of the ruling that was delivered on 7<sup>th</sup> October 2020, wherein the court, following inter partes hearing, granted interlocutory injunction orders in favour of the Plaintiffs/1<sup>st</sup> and 2<sup>nd</sup> Respondents, pending hearing and determination of the suit.
54. The Appellant has argued that there is no order that was made against him and therefore cannot be accused of being in contempt. Indeed, it is clear that the orders of the court were against the Defendant



and its agents, and while the Appellant acted for the Defendant as an advocate, he was not a party to the suit.

55. Despite the Appellant not being a party to the suit, courts have held that third parties may be indicted for contempt of court. In *Eliud Muturi Mwangi (Practising in the name and style of Muturi & Company Advocates) vs LSG Lufthansa Services Europa/ Africa GMBH & Another* [2015] eKLR, the court stated as follows:

“The law is that any person who has committed an act of contempt of court is liable for indictment. Therefore, even third parties who are not parties in a suit may be committed for contempt of court and classic examples are contempt on the face of the court, contempt by officers of a company or corporation, contempt by persons who are claiming under the title of a party in a suit or as assigns or successors in title.”

56. Having established that the orders were clear and unambiguous and that the parties, including the Appellant, were aware of the orders of injunction, the only issue for determination is whether the Appellant acted in breach of the said orders.

57. It is trite that contempt of court proceedings are quasi-criminal in nature due to the severe consequences that it attracts. Consequently, the standard of proof in such proceedings is higher than the balance of probabilities in civil cases although not as high as beyond reasonable doubt. As stated by the Supreme Court in *Republic vs Ahmad Abolfathi Mohammed & another* [2018] eKLR;

“The standard of proof in cases of contempt of Court is well established. In the case of *Mutitika v. 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.”

58. The Applicants before the trial court adduced the evidence of Brian Odityo, a manager at the 1<sup>st</sup> Respondent, to support the application for contempt. Mr. Odityo deponed that on 11<sup>th</sup> November 2020, he sought to inspect the suit property and that he introduced himself to a security guard wearing the uniform of the 3<sup>rd</sup> Respondent.

59. It was the deposition of Mr. Odityo that he gave the guard his credentials and a copy of the order dated 13<sup>th</sup> December 2019; that the guard spoke to a person he referred to as “the chairman,” who was the Appellant herein, and who was in his car all along and that the Appellant instructed the guard not to allow him (Mr. Odityo) in the suit premises contrary to orders of the court.

60. While finding that the Appellant was in contempt of the orders of the court, the trial magistrate based her decision on the fact that he (the magistrate) had not “deciphered any account that contradicts the incident of 11<sup>th</sup> November, 2020 as alluded to by the Plaintiff.” What this means is that the



Appellant had the burden of proof of disputing the assertion that he had told the guard not to allow the Respondents' agent in the suit property.

61. That position is contrary to the rule of evidence that he who alleges has the burden of proof, and more so in contempt proceedings. Indeed, the evidence relied on by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents is that the security guard was verbally informed by the Appellant not to allow the Respondents' agent in the suit premises. This is purely conjecture and hearsay evidence which is inadmissible in the circumstances of this case.
62. I say so because the said security guard who allegedly prevented the Respondents' guard neither filed an affidavit to support the Respondents' agent's allegation nor was called to testify in this matter. In the circumstances, it is the finding of the court that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents did not discharge their burden of proof, and the trial court fell in error by holding that the Appellant was in contempt of court.
63. The issue of whether the trial court had jurisdiction to deal with the suit before it was never raised, and is not before this court. I shall therefore not address it.
64. For those reasons, this court makes the following orders:
  - a. The Memorandum of Appeal dated 12th November, 2021 filed by the 3rd Respondent/Co-Appellant is hereby struck out.
  - b. The portion of the Ruling and Order of the trial court in Milimani Chief Magistrates Court Civil Suit No. 9208 of 2019 dated 29th October, 2021 which found the Appellant, Samuel Owuor Ogola, to be in contempt of the Orders of the court, is hereby set aside.
  - c. Each party to bear its/his own costs.

**DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 29<sup>TH</sup> DAY OF FEBRUARY, 2024.**

**O. A. ANGOTE**

**JUDGE**

In the presence of;

Mr. Situma for 3<sup>rd</sup> Respondent/Co-Appellant

Ms Waruguru for Appellant

Mr. Atako for 2<sup>nd</sup> Respondent

Court Assistant - Tracy

