



Huma v Association & another; Nairobi City County & 2 others (Respondent) (Environment and Land Case E318 of 2021) [2024] KEELC 870 (KLR) (15 February 2024) (Ruling)

Neutral citation: [2024] KEELC 870 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND CASE E318 OF 2021
OA ANGOTE, J
FEBRUARY 15, 2024**

BETWEEN

JOHN IRUNGU HUMA PLAINTIFF

AND

PLATEAU RESIDENTS ASSOCIATION 1ST DEFENDANT

SAMUEL WAINAINA 2ND DEFENDANT

AND

NAIROBI CITY COUNTY RESPONDENT

OCS KASARANI POLICE STATION RESPONDENT

ADMINISTRATION POLICE, ROYSAMBU SUB COUNTY RESPONDENT

RULING

Background

1. Vide a Notice of Motion dated 25th August, 2023 brought pursuant to the provisions of Sections 1A, 1B, 3 and 3A of the *Civil Procedure Rules*, 2010, Part 81 of the English *Civil Procedure Rules* and Order 51 Rule 1 of the *Civil Procedure Rules*, the Defendants/ Applicants seek the following reliefs as against the Respondents:
 - a. That the Honorable Court does hereby cite the 2nd, 3rd and 4th Respondents for contempt of Court and disobedience of Court orders issued on the 6th July, 2023 by Hon Justice O.A Angote.
 - b. That the Honourable Court does hereby direct that the 2nd, 3rd and 4th Respondents herein purge their contempt by jointly implementing the orders issued on 6th July, 2023 by Hon Justice O. A Angote.



- c. That any other further orders the Honourable Court deems fit and just to issue in the circumstances.
2. The application is based on the grounds on the face of the Motion and supported by the Affidavit of Samuel Wainaina, the 2nd Defendant/Applicant and Vice Chairman of the 1st Applicant duly authorized to swear the Affidavit on behalf of its officials and membership.
 3. The 2nd Defendant/Respondent deponed that on 28th July, 2023, the 3rd Respondent was served with a copy of the order issued on 6th July, 2023 directing him to implement the same; that on the same day, the Service Delivery Co-ordinator, Roysambu Sub-County refused to accept service of the Court order directing that the same be served upon the Nairobi City County since they had taken over the functions of NMS and that the 4th Respondent was served with the order on 31st July, 2023, whereas the 2nd Respondent, through its head of legal was served on 3rd August, 2023.
 4. According to Mr. Wainaina, on 15th August, 2023, the 2nd Respondent was served with a letter reminding him to implement the Court order and that on the same day, the 3rd Respondent was served with similar documents but refused to accept service indicating that he had received the earlier correspondence of 28th July, 2023 and had forwarded the same to the Police headquarters for further action.
 5. It was deposed by the 2nd Defendant/Applicant that the 4th Respondent was issued with a reminder on 16th August, 2023 which was received but the receipt was not acknowledged either by way of signature of stamp or otherwise; that the orders of 6th July, 2023 were clear and direct and that the 2nd, 3rd and 4th Respondents were made sufficiently aware of the same.
 6. Mr Wainaina stated that despite being made aware of the Court orders, the 2nd, 3rd and 4th Respondents have failed neglected and/or refused to implement the same and that the Respondents conduct is deliberate, malicious and intended to deny the Applicants' justice and disobey Court orders
 7. The Applicants, through Mr Wainaina, filed a Further Affidavit on 3rd October, 2023. They reiterated that on alternate days, the 1st -4th Respondents were served with the Court Orders issued on 6th July 2023; that contrary to the Court orders, the 1st Respondent has continued actively operating his car garage within the estate to the detriment of the Applicants and that unknown vehicles have also been sighted within the estate making deliveries of raw materials and products to the shops put up by the 1st Respondent.
 8. Mr Wainaina averred that the 1st Respondent's actions are contemptuous and in complete disregard of the Court orders; that the 2nd, 3rd and 4th Respondents have continued to aid the contemptuous actions by the 1st Respondent by failing, refusing and/or neglecting to implement the Orders as directed by the Court.
 9. It is the Applicant's case that the joint disregard and contempt of the Court by the Respondents and the consequent delay in the implementation of the Orders of this Court is detrimental to the rights of the Defendants/Applicants and constitutes a denial of justice and that as advised by Counsel, justice delayed is justice denied.
 10. The 2nd Respondent, through its Principal Counsel Mary Komo, filed a Replying Affidavit on 12th October, 2023. She deponed that the 2nd Respondent cannot be cited for contempt of orders issued on 6th July, 2023 not having been a party to the proceedings and not being aware of the orders.



1. It is the 2nd Respondent's case that they were served with pleadings in the matter on 11th September, 2023, to wit, the Motion, Court orders of 30th August, 2023 and hearing notice dated 7th September, 2023 prior to which they were not parties to the suit.
12. It was deposed that the County's functions were transferred to NMS on 9th March, 2020; that they have not been served with any application substituting the NMS with the County and that they are unable to respond to any applications that were filed prior to 11th September, 2023 as they were not parties to the suit. The parties did not file submissions.

Analysis and Determination

13. Upon consideration of the Motion and responses, the sole issue that arises for determination is whether the 2nd, 3rd and 4th Respondents are in contempt of the Court Orders issued on 6th July, 2023
14. By way of brief background, vide a Motion dated 13th February, 2023, the Applicants herein sought as against the 1st Respondent/Plaintiff, temporary injunctive orders restraining him or any person acting under him from illegally commercializing and/or carrying out industrial activities on the properties within the cluster. The Applicants further sought to have the 3rd and 4th Respondents herein jointly implement and enforce the aforesaid orders.
15. The Motion proceeded for inter-partes hearing and vide its Ruling rendered on 6th July, 2023, the Court granted the Applicants the temporary injunctive orders sought and directed that the 3rd and 4th Respondents jointly implement and enforce the aforesaid orders. According to the Applicant, the 2nd, 3rd and 4th Respondents are in blatant breach of the aforesaid orders.
16. Apart from the 2nd Respondent, none of the other Respondents filed a response to the Motion. The 2nd Respondent asserts that it was not a party to the suit, was unaware of the orders and as such cannot be cited for contempt.
17. The *Black's Law Dictionary* (Ninth Edition) defines contempt of Court as;

“Conduct that defies the authority or dignity of a Court. Because such conduct interferes with the administration of justice, it is punishable usually by fine or imprisonment.”
18. Discussing contempt, the Supreme Court in *Republic vs Ahmad Abolfathi Mohammed & Another* [2019] eKLR posited thus;

“There is no doubt that an act in contempt of the Court constitutes an affront to judicial authority; and the Court has the liberty and empowerment to mete out penalty for such conduct, in a proper case. The object is, firstly, to vindicate the Court's authority; secondly, to uphold honourable conduct among Advocates, in their standing as officers of the Court; and thirdly, to safeguard its processes for assuring compliance, so as to sustain the rule of law and the administration of justice”
19. Due to the repeal of the *Contempt of Court Act*, 2016, [see *The Kenya Human Rights Commission vs Attorney General & Another* [2018] eKLR] the substantive law governing contempt proceedings is the *Judicature Act*, section 5 of which provides as follows:

“(1) The High Court and the Court of Appeal shall have the same power to punish for contempt of court as is for the time being possessed by the High Court of



Justice in England, and such power shall extend to upholding the authority and dignity of subordinate courts.

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

20. Additionally, section 29 of the [Environment and Land Court Act](#) under the title offences provides 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.”

21. As a principle, Courts do not act in vain and their orders must at all times be obeyed. This was articulated by the Court of Appeal in [Shimmers Plaza Limited vs National Bank of Kenya Limited](#) [2015]eKLR which stated as follows:

“We reiterate here that court orders must be obeyed. Parties against whom such orders are made cannot be allowed to trash them with impunity. Obedience of Court orders is not optional, rather, it is mandatory and a person does not choose whether to obey a court order or not. For as Theodore Roosevelt, the 26th President of the United States of America once said:-

“No man is above the law and no man is below it; nor do we ask any man’s permission to obey it. Obedience to the law is demanded as a right; not as a favour”.

The courts should not fold their hands in helplessness and watch as their orders are disobeyed with impunity left, right and centre. This would amount to abdication of our sacrosanct duty bestowed on us by the *Constitution*. The dignity, and authority of the Court must be protected, and that is why those who flagrantly disobey them must be punished, lest they lead us all to a state of anarchy.”

22. It is trite that contempt proceedings are quasi-criminal in nature due to the severe consequences they attract. 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."

23. In order to succeed in civil contempt proceedings, the Applicant has to prove: (i) that the terms of the order were clear, unambiguous and binding on the Respondent, (ii) knowledge of these terms by the Respondent, (iii) failure by the Respondent to comply with the terms of the order and, iv) deliberate conduct by the Respondent (see *North Tetu Farmers Co. Ltd vs Joseph Nderitu Wanjohi* [2016] eKLR and *Republic vs Attorney General & another Ex parte Mike Maina Kamau* [2020] eKLR).
24. Having perused the orders of 6th July, 2023, the Court finds that its terms were clear and precise and its import was to restrain the 1st Respondent or any other party acting under him or any other resident of the Plateau Residents Cluster from carrying out commercial or industrial activities on the suit property.
25. The second part of the orders required the OCS Kasarani Police Station, in collaboration with the compliance and services Delivery Co-ordinator-Roysambu Sub-County and the Administration Police under the Chief Roysambu County to jointly implement and enforce the Court Orders.
26. It is at the onset noted that the present Motion only seeks to cite the 2nd -4th Respondents for contempt. It is not clear why 1st Defendant/ Applicant has not cited the Plaintiff/1st Respondent, who is accused of undertaking acts that this court prohibited him from doing. This in my view is a fatal omission by the Applicant.
27. The above notwithstanding, the Applicant has vide the Further Affidavit alluded to breach and contemptuous actions by the 1st Respondent. It is trite that parties are bound by their pleadings and it would appear that the Applicant is attempting to amend his Motion through the Affidavit, which is not permissible.
28. The Applicant asserts that the orders were duly served on the Respondents. As regards the 3rd -4th Respondents, the Applicants have adduced uncontroverted evidence of service upon them and the Court finds that they were sufficiently notified of the Court orders. Whereas the 2nd Respondent disputes service, there is evidence that it was duly served at the direction of the Service Delivery Co-ordinator Roysambu County.
29. The next question regards whether there was breach of the Court orders. The 2nd Respondent asserts that it is not a party to the proceedings and as such cannot be held in contempt of the Court Orders. Indeed, the 2nd Respondent is not a party to these proceedings, and neither were any directions issued directly against it.
30. With regard to the 3rd and 4th Respondents, they did not file any response, essentially rendering the Applicant's contentions uncontroverted. Nonetheless, the Applicant still had the burden of proving breach as alleged. This is moreso considering the quasi criminal nature of contempt and the requisite burden.
31. According to the Applicant, the 2nd -3rd Respondents have failed to ensure compliance of the Court orders as directed by the Court because the 1st Respondent still continues to undertake the restrained actions. They have adduced copies of photographs of what has been described as an active garage as well as photographs of vehicles making deliveries of raw materials to shops put up by the 1st Respondent.



32. On the face of it, the photographs do indeed show cars in what can be said to be a garage as well as a car with an open boot. However, these photographs have not been contextualized.
33. It has not been indicated where or even when the photographs were taken. Even if the Court were to find that it is the suit property, this court cannot affirm that these activities took place after the issuance of the Court orders. What arises from the foregoing is that the Applicant has failed to show that the restrained actions are still being undertaken by the 1st Respondent.
34. There being no evidence that the restrained activities are still taking place, can it be said that the 3rd and 4th Respondents have failed to implement and enforce the orders? The Court thinks not. The 3rd and 4th Respondents were directed to ensure that the 1st Respondent was not undertaking any industrial and/or commercial activities on the suit property and as such, their breach can only be proved by showing that the activities are still ongoing despite the Court Order.
35. The fact that the Applicant has not proved that the 1st Respondent has disobeyed the court order, and the failure to cite the 1st Respondent for contempt in the application renders the application a non-starter.
36. The upshot of the foregoing is that the application dated 25th August, 2023 is unmerited and is dismissed with no order as to costs.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 15TH DAY OF FEBRUARY, 2024.

O. A. ANGOTE

JUDGE

In the presence of;

Ms. Mwangera holding brief for Mr. Etemesi for Defendant

Ms Komo for Interested Party

Court Assistant - Tracy

