



**Nelifa Holdings Limited v Kanee (Civil Appeal E026 of 2023)
[2024] KEELC 686 (KLR) (15 February 2024) (Judgment)**

Neutral citation: [2024] KEELC 686 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
CIVIL APPEAL E026 OF 2023
JO MBOYA, J
FEBRUARY 15, 2024**

BETWEEN

NELIFA HOLDINGS LIMITED APPELLANT

AND

PETER MWANGI KANEE RESPONDENT

(Being an Appeal from the Ruling and Orders of the Chief Magistrate's Court at Nairobi [Wendy Micheni (CM)] delivered on 13th September 2023 in Nairobi Chief Magistrate's Court ELC case Number E429 of 2021)

JUDGMENT

Introduction and Background:

1. The instant Appeal arises out of a Ruling rendered on the 13th September 2023; by the Hon. Wendy Micheni, Chief Magistrate; and wherein same allowed the Application dated the 17th December 2021, which essentially sought to cite and punish the Defendant and [sic] her Directors for Disobedience of lawful court orders.
2. Aggrieved and/or dissatisfied by the Ruling of the Learned Chief Magistrate, the Appellant has moved the Honourable court vide Memorandum of Appeal dated the 28th September 2023; and in respect of which same [Appellant] has highlighted the following Grounds of Appeal;
 - i. The Learned Magistrate erred in law and in fact in holding that the Appellant had failed to comply with the terms of the *ex-parte* orders issued on the 12th November 2021 which restrained the Appellant from evicting the Respondent from Land Reference No 209/9832. This is despite evidence that the *ex-parte* orders could not be enforced at all as they were granted based on



- misleading facts from the Respondent that he was in occupation of the suit property.
- ii. The Learned Magistrate erred in law and in fact in holding that the Appellant disobeyed the *ex-parte* orders issued on the 12th November 2021; by evicting the Respondent from the suit property despite evidence that the Respondent was never in possession of the suit property and therefore could not be evicted therefore.
 - iii. The Learned Magistrate erred in law and in fact in holding that the Respondent has been evicted from the suit property thereby rendering the Application dated the 10th November 2021 which sought injunctive orders against the Appellant, overtaken by events. This is despite the fact that the said Application also sought injunctive orders pending determination of the suit which is still pending.
 - iv. The Learned Magistrate erred in law and in fact in failing to consider the Appellant's evidence and submissions to the effect that the Respondent was not entitled to the *ex-parte* injunction orders despite having found that the court was not in possession of the evidence attached in the Replying affidavit when it issued the *ex-parte* injunctive orders pending determination of the application.
 - v. The Learned Magistrate erred in law and in fact in arriving at a decision that was illogical and contradictory, because despite having found that the Inter-Partes hearing of the Application would have led to a different outcome from the one arrived at by the court when it granted the *ex-parte* order she still failed to consider the application dated the 10th November 2023 (sic).
 - vi. The Learned Magistrate erred in law and in fact in failing to find that the Respondent has not certified the test for a grant of a temporary injunction yet parties have made submissions on same.
3. Following the filing of the Record of Appeal, the subject matter/ Appeal came up for directions on the 5th December 2023; in accordance with the provisions of Order 42 Rule 13 of the [Civil Procedure Rules, 2010](#), whereupon both Parties confirmed that the Record of Appeal was complete and that the appeal was thus ready and ripe for hearing.
 4. Furthermore, the advocates for the respective Parties similarly agreed to canvass and dispose of the appeal by way of written submissions . Consequently and in this regard, the Honourable court proceeded to and set timeline for the filing and exchange of written submissions.
 5. Suffice it to point out that the Appellant thereafter proceeded to and filed written submissions dated the 19th December 2023; whereas the Respondent filed what is titled as “Appellant’s Written Submissions” but essentially should be the Respondent’s written submissions dated the 19th January 2024.
 6. Nevertheless, both sets of written submission are on record.



Parties' Submissions

a. Appellants' Submissions:

7. The Appellant herein filed written submissions dated the 19th December 2023; and in respect of which same (Appellant) has raised, highlighted and canvassed two [2] issues for consideration by Honourable court. For coherence, the first issue canvassed by learned counsel for the Appellant gravitates and revolves around grounds 3, 4, 5 and 6 of the Memorandum of Appeal.
8. The second issue which has been highlighted and canvassed by the Appellant relates to whether or not the finding by the learned Chief Magistrate pertaining to disobedience of (sic) the court order, were lawful and/or legitimate. Instructively and for good measure, the 2nd issue herein captures and espouses grounds numbers 1 and 2 of the memorandum of appeal.
9. In respect of the first issue, Learned counsel for the Appellant has submitted that the learned Chief Magistrate erred in fact and in law in finding and holding that the Respondent has actually been evicted from the suit property. In this regard, Learned counsel has submitted that the Respondent herein was never in occupation of the suit property or any portion thereof as at the time when same (Respondent) filed the original suit before the Chief Magistrate's court.
10. Furthermore, Learned counsel has also submitted that even when the honorable court (chief magistrate) proceeded to and issued the orders of interim injunction dated the 12th November 2021, the Respondent was not in occupation of the suit property and hence the orders of interim injunction, which were granted, were practically inconsequential and legally untenable.
11. In any event, Learned counsel for the Appellant has thereafter invited the court to take cognizance of the Replying affidavit which was sworn on the 12th April 2023; by one Zephania Gitau Mbugua and in respect of which, the said Deponent has provided a historical background to the dispute, inter-alia outlining various/previous suits touching on and concerning the suit property.
12. On the other hand, Learned counsel for the Appellant has also invited the Honourable court to find and hold that the Respondent herein had neither established nor demonstrated any prima facie case or at all capable of warranting the grant of orders of interim injunction or at all.
13. Whilst canvassing the first issue, Learned counsel for the Appellant has similarly submitted that the Respondent herein proceeded to and procured *ex-parte* orders of interim injunction, albeit without placing before the Honorable court all the material facts and information, touching on and concerning the subject dispute.
14. Similarly, Learned counsel for the Appellant has also contended that the Respondent herein has also been involved in a plethora of suits filed against the Appellant and touching on and concerning the suit property. For clarity, Learned counsel for the Appellant has thereafter proceeded to and highlighted various cases, namely, Nairobi ELC 842 of 2007; HCC No 910 of 2007 (OS) and Nairobi ELC No 91 of 2010 (OS), respectively, which are said to have been filed by the Respondent herein or through his Representatives.
15. Having highlighted the foregoing issues, learned counsel for the Appellant has thereafter ventured forward and implored the Honourable court to find and hold that the Application dated the 12th November 2021; which essentially sought for injunctive orders, was devoid of merits and hence ought to have been dismissed.



16. In respect of the second issue, Learned counsel for the Appellant has submitted that the Respondent herein was never in possession of the suit property or any portion thereof and hence it was neither tenable nor practicable to evict the Respondent from the suit property, either in the manner held by the Chief Magistrate or at all.
17. Additionally, Learned counsel for the Appellant has submitted that insofar as the Respondent was not in occupation of the suit property, the contention that same was evicted therefrom and which anchors the Application for disobedience, is therefore misconceived and legally untenable.
18. Nevertheless, Learned counsel has pointed out that the Appellant herein did not evict the Respondent from the suit property or any portion thereof, to warrant the finding and holding that the Appellant was guilty of [sic] willful disobedience of lawful court orders.
19. In support of the submissions that the Appellant did not act contrary to and/or in contravention of the orders of the court, Learned counsel for the Appellant has cited and relied on the case of *Gatharia K Mututika v Babarini Farm Ltd* (1985)eKLR, where the Court underscored the standard of proof attendant to charges pertaining to Contempt of court.
20. Consequently and in view of the foregoing, Learned counsel for the Appellant has thereafter implored the Honourable court to find and hold that the instant Appeal is meritorious and thus ought to be allowed with costs.

b. Respondent's Submissions:

21. The Respondent herein vide submissions titled as Appellant's Written submissions, but which essentially should be the Respondent's submissions dated the 19th January 2024; has highlighted and canvassed three [3] issues for due consideration and determination by the Honourable court.
22. Firstly, Learned counsel for the Respondent has contended that the Record of Appeal before the court is incompetent insofar as the Appellant herein has included in the said Record of Appeal copies of pleadings which were filed long after the Ruling rendered on the 13th September 2023, which is the subject of the Appeal herein.
23. To the extent that the Appellant has included pleadings filed after the delivery of the impugned Ruling, Learned counsel for the Respondent has therefore submitted that the offensive inclusion of the said Pleadings/documents, thus renders the Record of Appeal deficient and entire Appeal incompetent.
24. In support of the foregoing submission, Learned counsel for the Respondent has cited and relied on the holding in the case of *Bwana Muhamed Bwana v Silvano Buko Bonaya & 2 others* (2015)eKLR.
25. Secondly, Learned counsel for the Respondent has submitted that the interim orders of injunction which were granted and issued on the 12th November 2021, were neither issued on the basis of misrepresentation nor non-disclosure, either as contended by the Appellant or at all.
26. Furthermore, Learned counsel for the Respondent has submitted that the Respondent herein has been in occupation and possession of a portion of the suit property since 1977; and hence the orders of Interim injunction were well grounded and merited.
27. Additionally, Learned counsel for the Respondent has submitted that it is the Appellant herein who despite being served with the court orders proceeded to and demolished the Respondent structures.



28. Premised on the foregoing, Learned counsel for the Respondent has thereafter invited the Honourable court to find and hold that the offensive actions by and on behalf of the Appellant constituted willful disobedience of lawful court orders.
29. In support of the foregoing submissions and in particular the aspects pertaining to the an unqualified obligation to comply with and adhere to court orders, Learned counsel for the Respondent has cited and relied on, *inter-alia*, [Hadkinson v Hadikson](#) (1952) ALL ER 285 and [Johnson v Walton](#) (1990) 1FLR 350, respectively.
30. Thirdly, Learned counsel for the Respondent has submitted that the Respondent herein was in occupation and possession of the suit property since 1977; and hence it is misleading and in correct for the Appellant to contend that the Respondent was not possession of the suit property.
31. Further and in any event, Learned counsel for the Respondent has submitted that it is the occupation and possession of the suit Property by, *inter-alia*, the Respondent herein, which precipitated the issuance and service of the Eviction Notice by the Appellant herein.
32. Other than the foregoing, Learned counsel for the Respondent has ventured forward and implored the court to find and hold that the Respondent was indeed in occupation of a portion of the suit property by virtue of a water bill issued by Nairobi water company. For coherence, Learned counsel for the Respondent has highlighted the documents at page 9 of the Record of Appeal.
33. Arising from the foregoing, Learned counsel for the Respondent has therefore invited the Honourable court to find and hold that the instant Appeal is devoid of merits and otherwise constitutes an abuse of the Due process of the court.
34. Besides, Learned counsel for the Respondent has reminded the court that citation and punishment of Parties for disobedience of lawful court orders, is a critical tool that is often do deployed with a view to safeguarding the Rule of Law; which is fundamental in the Administration of Justice.

Issues for Determination:

35. Having reviewed the entire Record of Appeal, the proceedings of the court, the impugned Ruling, as well as the written submissions filed by and on behalf of the respective Parties, the following issues do emerge and are thus worthy of determination;
 - i. Whether the *ex-parte* orders of Interim Injunction issued on the 12th November 2021; were in existence or at all, on the 30th November 2021.
 - ii. Whether the Appellant was guilty of willful disobedience and/or disregard of [sic] of the orders issued on the 12th November 2021.
 - iii. Whether the acts complained of and which premise the finding of Contempt, were duly established and proved to the requisite standard or otherwise.



Analysis And Determination:

Issue Number 1

Whether the *ex-parte* orders of Interim Injunction issued on the 12th November 2021; were in existence or at all on the 30th November 2021.

36. Before venturing to address the issue herein before mentioned, it is instructive to underscore that the instant suit was filed by and on behalf of the Respondent herein vide Complaint dated the 10th November 2021; and in respect of which the Respondent sought for one primary relief, namely, an order of Permanent Injunction.
37. Simultaneously with the filing of the suit, the Respondent herein also filed an Application dated the 10th November 2021; and in respect of which same sought for orders of temporary injunction pending, inter-partes hearing of the Application, as well as the determination of the suit.
38. Notably, the Application dated the 10th November 2021; was placed before the Learned Chief Magistrate on the 12th November 2021; who thereafter proceeded to and certified the Application as urgent and proceeded to grant orders in the following terms;
- i. The Application is certified as urgent.
 - ii. That pending the hearing of the application inter-partes, the Defendant by itself, servants or agents is restrained from eviction or removing the Applicant's house or structure.
 - iii. That the Defendant be served with the application and all pleadings in the next 5 days from the date hereof.
 - iv. The hearing inter-partes be on 24th November 2021.
39. From the foregoing, it is evident that the Learned Chief Magistrate set the return date for inter-partes hearing on the 24th November 2021. In this regard, it then means that the *ex-parte* interim orders which were issued on the 12th November 2021; were to subsist until the return date.
40. Furthermore, it is common ground that on the return date, namely, the 24th November 2021, the Learned Chief Magistrate would have been seized of the requisite Jurisdiction to extend the interim orders subject to compliance with the provisions of Order 40 of the Civil Procedure 2010, which circumscribes the circumstances under which an *ex-parte* order may be extended.
41. Be that as it may, the critical point for interrogation is whether or not the *ex-parte* interim order which were granted on the 12th November 2021, were duly extended on the 24th November 2021 or otherwise. Nevertheless, in an endeavor to ascertain whether or not the said orders were extended, this Honorable court has appraised the proceedings that had been availed and which formed part of the Record of Appeal, but unfortunately there is no proceedings pertaining to the events of the 24th November 2021 or at all.
42. Furthermore, it is also important to point out that the proceedings that have been availed and which formed part of the Record of the court [the Trial Court], commence from the 7th December 2021.



43. Consequently and without belaboring the point, the entire set of proceedings which have been availed to this Honourable court include the order issued on the 12th November ; and thereafter the proceedings running from 7th December 2021 to the 13th September 2023 and not otherwise.
44. Having pointed out the foregoing, it is now important to revert back and to engage with the issue that had been framed by the court, namely, whether the *ex-parte* injunction granted on the 12th November 2021, was in existence as at the 30th November 2021, when it is contended that the Appellant herein undertook the offensive activities complained of.
45. Be that as it may, I beg to point out that insofar as there are no proceedings touching on and or concerning (sic) the extension of the *ex-parte* interim orders issued on the 12th November 2021, same automatically lapse and thus ceased to exist, in the eyes of the Law.
46. Premised on the foregoing, it is therefore common ground that even though the Respondent herein had procured and obtained *ex-parte* interim orders, same lapsed and were thus therefore non-existent as at the 30th November 2021.
47. Other than the foregoing, this Honourable court is also privy to an averment alluded to at the foot of Prayer Number 2 of the Application dated the 17th December 2021; wherein the Respondent herein seems to acknowledge that the *ex-parte* interim orders which had hitherto been issued on the 12th November 2021, were reinstated on the 30th November 2021; and thereafter extended on the 7th December 2021.
48. Despite the contention by and on behalf of the Respondent that the *ex-parte* interim orders were reinstated on the 30th November 2021, there is however, no scintilla of evidence, to demonstrate that such a reinstatement ever occurred or at all. For the avoidance of doubt, it suffices to point out that wherever a Court of Law, the Chief Magistrates Court not excepted, makes an Order same must be recorded .
49. Consequently and in the premises, if the *ex-parte* interim orders hitherto issued on the 12th November 2021, were allegedly re-instated in the manner contended, then no doubt, there would be proceedings of the court to vindicate (sic) such re-instatement. However, this court has pointed out elsewhere herein before that there are no such proceedings at all.
50. Moreover, even assuming for academic purposes, that the order which was issued on the 12th November 2021, was ever reinstated, [for which, there is no Evidence], there is the question as to whether an order which has lapsed and therefore ceased to exist can (sic) be reinstated or at all.
51. In my humble view, it is trite and established that once an *ex-parte* order lapses, same ceases to exist and hence there cannot be a debate pertaining to re-instatement. Perhaps, what ought to ordinarily happen is an order for issuance of a fresh order, albeit on same terms or otherwise.
52. Be that as it may, the critical point that this court was engaging with, relates to whether or not, the orders issued on 12th November 2021, [which underpinned the application for disobedience/contempt], was still in existence and thus capable of being Disobeyed or at all.
53. In answer to this issue, [Issue Number One], I find and hold that the orders which were issued on the 12th November 2021, automatically lapsed on the 24th November 2021, when same appear not to have been extended or at all.



Issue Number 2

Whether the Appellant was guilty of willful Disobedience and/or disregard of (sic) of the orders issued on the 12th November 2021.

54. Whilst discussing issue number one [1] herein before, the court has established and held that the *ex-parte* interim orders which were issued on the 12th November 2021; lapsed on the return date, namely, the 24th November 2021, when same were not extended or at all.
55. Notwithstanding the foregoing, the Application for contempt/disobedience, which culminated into the impugned ruling, was informed by disregard of the said orders. Consequently, it behooves this court to interrogate and ascertain whether the Appellant herein actually disobeyed and/or disregarded the said court orders.
56. First and foremost, it is imperative to recall and reiterate that the limb of the order issued on the 12th November 2021; restrained the Appellant from evicting or removing the Respondent's house or structures from the Suit Property.
57. Nevertheless, it is the Respondent's position that despite the existence of the said order, the Appellant went ahead and evicted same (Respondent) from the suit property or a portion thereof, on the 30th November 2021.
58. Having contended that the Appellant proceeded to and evicted same (Respondent) from the suit property, the Respondent proceeded to and filed the Application for Contempt and in an endeavor to convince the Learned Chief Magistrate on the question of eviction, proceeded to annex some Photographs which were marked as annexures PMK 3(a).
59. Other than the photographs, [which are curious and appear to be assorted iron sheets neatly and methodically placed on the ground], there is no other Evidence at all to demonstrate Eviction or otherwise.
60. Other than the foregoing, it is imperative to point out that whenever a litigant, the Respondent herein not excepted, is desirous to rely on any Electronic Evidence, inter-alia photographs, the Claimant is obliged to tender before the court not only the Electronic evidence, but also an Electronic Certificate in accordance with the provisions of Section 106B of the [Evidence Act](#), Chapter 80 Laws of Kenya.
61. In respect of the Application for contempt, which was placed before the Learned Chief Magistrate, it is worthy to recall and note that the curious photographs, were neither accompanied by an Electronic Certificate or at all.
62. Other than the foregoing, it is also important to highlight that the photographs relating to iron sheets and assorted Round-Poles, (which appear curious and methodically arranged), do not bear the date, time and place where same were taken. In this regard, only the Respondent; and perhaps God in heaven, knows where the photographs were taken from.
63. Remarkably, where a Party, the Respondent not excepted desires a court of law to act on a particular piece of Evidence, then it is incumbent upon the concerned Party to venture forward and endeavor to bring the piece of Evidence within the parameters of the law of evidence and thus to espouse before the court a document which has some degree of probative value and not otherwise.
64. Instructively and in my humble view, the Photographs, which were presented before the Learned Chief Magistrate and upon which same (chief magistrate), proceeded to find and hold that there was Eviction of the Respondent from the suit property, were deliberately doctored, concocted and manipulated.



65. Sadly, the Learned Chief Magistrate did not forewarn herself of the dangers of Electronic evidence, which are capable of manipulation and thus failed to take pre-caution in accordance with the prescription of the law.
66. To my mind, had the Learned Chief Magistrate appraised herself of the obtaining Jurisprudence pertaining to receipt and probative value of Electronic Evidence, inter-alia photographs, same would no doubt, have come to a different conclusion.
67. Before departing from this pertinent aspect, it is instructive to cite and reiterate the decision of the Court of Appeal in the case of *The Speaker, County Assembly of Kisumu & 2 others v Clerk, Kisumu County Assembly Service Board & 6 others* [2015] eKLR, where the court held thus;

65. Section 106B of the *Evidence Act* states that electronic evidence of a computer recording or output is admissible in evidence as an original document “if the conditions mentioned in this section are satisfied in relation to the information and computer.”

66. In our view, this is a mandatory requirement which was enacted for good reason. The court should not admit into evidence or rely on manipulated (and we all know this is possible) electronic evidence or record hence the stringent conditions in sub-section 106B(2) of that Act to vouchsafe the authenticity and integrity of the electronic record sought to be produced. For ease of reference, we wish to reproduce Section 106B of the *Evidence Act* in its entirety:

“106B

- (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 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) Where over any period, the function of storing or processing information for the purposes of any activities regularly carried on over that period as mentioned in paragraph (a) of sub section (2) was regularly performed by computers, whether—
- (a) by combination of computers operating in succession over that period; or
 - (b) by different computers operating in succession over that period; or
 - (c) in any manner involving the successive operation over that period, in whatever order, of one or more computers and one or more combinations of computers,
- then all computers used for that purpose during that period shall be treated for the purposes of this section to constitute a single computer and references in this sections to a computer shall be construed accordingly.



- (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 sub-section (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.
- (5) For the purpose of this section, information is supplied to a computer if it is supplied thereto in any appropriate form and whether it is so supplied directly or (with or without human intervention) by means of an appropriate equipment whether in the course of activities carried on by any official, information is supplied with a view to its being stored or processed for the purpose of those activities, that information, if duly supplied to that computer, shall be taken to be supplied to it in the course of those activities.”

67. In relation to this case, the relevant conditions in that section are (a) if the computer output was recorded by a person having lawful control over the computer used; (b) if the output was recorded in the ordinary course of that person’s activities using a computer or some other electronic device and fed into a computer that was properly operating throughout the material period; and (c) if that person gives a certificate that to the best of his knowledge, the



output is an electronic record of the information it contains and describes the manner in which it was produced.

68. The *Evidence Act* does not provide the format the certificate required under sub-section 106B(2) thereof should take. The certificate can therefore take any form including averments in the affidavit of the recorder.
69. In this case as we have said the electronic record was made by one Denis Kongo, a freelance photojournalist. He, however, did not annex to his affidavit sworn on 11th December 2014 the required certificate. The averments in that affidavit themselves did not meet the above stated threshold of sub-section 106B(2) of the *Evidence Act*. Those averments therefore fell short of the required certificate. In the circumstances, we agree with counsel for the appellants that the electronic evidence of Denis Kongo was inadmissible and the learned Judge erred in relying upon it.

68. Similarly, the significance of an Electronic Certificate, was also elaborated upon and emphasized in the case of *Mumias Sugar Company Limited & 5 others v Musa Ekaya* [2017] eKLR, where the court held as hereunder;

“The impugned publications which the plaintiffs allege are defamatory are contained in the Respondent’s Facebook page. The relevant extracts were downloaded and/or printed by the Applicants and submitted to Court as evidence. The respondent has challenged the authenticity of the extracts in that the Applicants did not provide the basic requirements to prove that the account belongs to him. The law is very clear on the production of electronic evidence. Section 106A of the *Evidence Act* (Cap 80) provides that the contents of electronic records may be proved in accordance with the provisions of section 106B.

Section 106B (4) provides that;

where a party seeks to give evidence by virtue of section 106B, he has, among other things, to tender a certificate dealing with any matters to which the conditions above relate. The certificate should further:

- a) identify the electronic record containing the statement and describing the manner in which it was produced; and
- b) give 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.

The above condition was not met in this case. The Applicants have not annexed any certificate to show how the impugned statement was obtained. Given the advancement in technology, it is easy to have the original information stored in an electronic device distorted in the process of obtaining the evidence, hence, the requirement for the conditions provided in this section have to be met. In the case of *Republic v Barisa Wayu Matuguda* [2011] eKLR the court held that,

“This provision makes it abundantly clear that for electronic evidence to be deemed admissible, it must be accompanied by a certificate in terms of section 106B (4). Such certificate must in terms of S.106B (4)(d) be signed by a person



holding a responsible position with respect to the management of the device....
Without the required certificate this CD is inadmissible as evidence.”

69. Consequently and in view of the holding of the Courts in the decision cited, which underscore the obtaining Jurisprudence, I find and hold that the fulcrum upon which the learned Chief Magistrate relied on in finding and holding that contempt had been established and proved, is legally untenable.
70. Other than the questionable photographs, which were bandied around by the Respondent to propagate the plea of contempt and disobedience; there is yet another issue that deserves a short mention and analysis.
71. For good measure, the issue relates to whether the offensive activities, are being raised on the basis of the non-existent order hitherto issued on the 12th November 2021; or the purported reinstatement on the 30th November 2021.
72. Simply put, if the orders hitherto issued on the 12th November 2021; had lapsed and the Respondent was forced to seek for reinstatement on 30th November 2021, then the only orders, [if any], were the ones issued on the 30th November 2021.
73. Nevertheless, I do not wish to belabor the point insofar as the contempt proceedings, were not anchored on the basis of (sic) the reinstatement [the Orders of reinstatement], made on the 30th November 2021, but on the orders issued on the 12th November 2021.
74. In a nutshell, my answer to issue number two [2] is two-fold. Firstly, the Respondent neither proved nor demonstrated any act of disregard and/or willful disobedience of the court orders.
75. Secondly and without sounding reputative, the purported orders issued on the 12th November 2021, lapsed and ceased to exist and hence same were incapable of anchoring an Application for contempt and/or disobedience, whatsoever.

Issue Number 3

Whether the acts complained of and which premise the finding of Contempt, were duly established and proved to the requisite standard or otherwise.

76. It is not lost on this Honourable court that what was before the learned Chief Magistrate was for an Application for disobedience of lawful court orders, which had hitherto been issued and whose purpose was to restrain the Appellant herein from Evicting the Respondent from the suit property or a portion thereof.
77. To the extent that the orders restrained the Appellant from evicting the Respondent from the suit property, the presupposition was that the Respondent, was indeed in possession and occupation of the suit property.
78. However, from the onset, it is important to recall that when the Respondent herein filed the suit and in respect of which same sought for Permanent injunction, the Respondent herein only adverted to two documents, namely, a water bill and a Eviction notice. Quiet clearly, the Respondent herein did not avail and/or place before the court [the Chief Magistrates’ Court], any evidence of an existing house or structure of whatsoever shape and/or status.
79. Having not put and/or place before the court any iota of evidence of a house or structure, which was (sic) standing on the suit property, at the time of filing of the suit, there is an inference and/or



implication, that there was no such structure or at all. [See the import and tenor of the provisions of Section 112 of the *Evidence Act*, Chapter 80, Laws of Kenya]

80. Nevertheless, the critical point worthy of address is whether a structure or house, which had not been demonstrated in the first instance, was and could be demolished.
81. Put differently, if no evidence of a house and structure had been placed before the Honourable court at onset, it is possible to agitate a contention that what was not there, has now been demolished.
82. Secondly, there is also the evidence that was placed before the court in terms of the Replying affidavit sworn on the 12th April 2023; and which averred inter-alia, that the Respondent herein had never been in occupation of the suit property or any portion thereof.
83. Suffice it to point out that the elaborate and comprehensive Replying affidavit sworn by Zephania Gitau Mbugua; and which run into a total of 52 paragraphs and annexes plethora of Exhibits, was neither controverted nor challenged by the Respondent herein in terms of a Further or Supplementary affidavit.
84. Suffice it to point out that where there are adverse averments and/or depositions contained in a Replying affidavit, it behooves the Applicant and in this case the Respondent, to file a Further affidavit and respond to the adverse averments. In the event, that no Further or Supplementary affidavit is filed, a court of law shall be left to take the averments in the Replying affidavit as uncontroverted, or better still, admitted.
85. To this end, it suffices to adopt and reiterate the dictum of the Court in the case of *Mohammed & another v Haidara* [1972] E.A 166 [at page 167 paragraph F-H], where Spry V.P expressed himself as follows;

“The respondent made no attempt to reply to these allegations and they therefore remain unrebutted...Here, the respondent’s affidavit gives no material facts and the only real evidence of facts is that contained in the appellant’s affidavit. In these circumstances, it seems to me that a replying affidavit was essential. There was no need for it to be prolix but it should have made clear which of the facts alleged by the appellants were denied...”

86. Thirdly, it is also important to point out that even the Learned Magistrate seems to have appreciated the position that the Respondent herein was not in possession of the suit property or any portion thereof from the onset. In this respect, it suffices to reproduce a segment of the Ruling of the Learned Chief Magistrate.
87. Same are reproduced as hereunder;

“The orders granted were clear and left no room for ambiguity that the Defendant would wriggle out of. Be that as it may, the Defendant herein claimed that the Plaintiff was never in possession of the property of the suit property or have any structure on it.

The court then was not in possession of the pictures attached thereto in the replying affidavit. I am of the view, that at the inter-parte hearing and the delivery of the ruling, the court probably (sic) a different out come would have arrived at. However, the matter did not proceed for inter-pares hearing as the Plaintiff was put out of the premises”

88. Though the excerpt appears incoherent, perhaps because of the Typist missing out on certain words/ mis-spelling others, what is discernable from the excerpt is to the effect that the Chief Magistrate was confronted with an unresolved question as pertains to occupation and possession.



89. In my humble view, the question as to whether or not the Respondent herein was in possession and occupation of the suit property or a portion thereof, was critical and paramount and same ought to have been resolved, prior to and before venturing to address whether Eviction occurred or otherwise.
90. Furthermore, it defeats logic and all forms of comprehension, for the Learned Chief Magistrate to proceed and hold that there was contempt vide Eviction, albeit before ascertaining, if at all, there was occupation in the first place.
91. Pertinently, one cannot with respect speak about a person being evicted from the suit property or a portion thereof, without first and foremost discerning and establishing the obvious.
92. Having highlighted the various perspectives, which are espoused in the preceding paragraphs, it is now appropriate to state that whereas courts of law should be ready and willing to cite and punish for contempt or willful disobedience of court orders, the courts themselves must remain alert to eschew circumstances where certain Parties are keen to deploy the tool of contempt for ulterior and/or sinister purposes.
93. Further and in any event, the courts of law must also continue to ensure that whenever same are confronted with pleas of contempt and willful disobedience of lawful court order, the Claimants must be put to task to prove the allegation to the requisite standard namely, the intermediate standard.
94. As pertains to the requisite standard of proof in respect of contempt or willful disobedience of court orders, it suffices to reiterate the dictum of the Court of Appeal in the case of *Muttika v Baharini Farm Ltd*[1985] eKLR, where the court held thus;
- “With the greatest possible respect to that eminent English judge, that proof is much too high for an offence “of a criminal character” and, ipso facto, not a criminal offence properly so defined.
- We agree with Mr. Khaminwa’s submissions in this respect. In our view the standard of proof in contempt proceedings must be higher than proof on the balance of probabilities, almost but not exactly, beyond reasonable doubt. We envisage no difficulty in courts determining the suggested standard of proof. The standard of proof beyond reasonable doubt ought to be left where it belongs, to wit, in criminal cases.”
95. To my mind, the kind of averments, allegations and documents which were placed before the Honorable court on behalf of the Respondent and upon which the Learned Chief Magistrate proceeded to cite and hold the Appellant to be in contempt, cannot meet/satisfy the requisite threshold.
96. Nevertheless, therein is no gainsaying that all Parties and or litigants are under unqualified obligation to adhere to and/or comply with the terms of the court orders, until and unless same are varied, rescinded and or reviewed. [See *Hadkinson v Hadkinson* (1952)2 ALL ER 211].
97. Be that as it may, my answer to issue number three [3] above is to the effect that the Respondent herein has neither placed nor tendered before the Honourable court any scintilla of evidence of willful disobedience of (sic) the court orders issued on the 12th November 2021.

Final Disposition:

98. Having reviewed various perspectives [nuances], touching on and concerning the subject matter; and having analyzed the thematic issues that were enumerated in the body of the Judgment, it is evident that the Appeal beforehand is meritorious.



99. Conversely, it is apparent that the Learned Chief Magistrate, erred both in fact and in law in finding and holding that the Respondent had duly proved the plea of Contempt and willful disobedience of the court orders (sic) dated the November 12, 2021.
100. Consequently and in the premises, the court comes to the conclusion that the Appeal herein deserves being allowed. In this regard, the Appeal be and is hereby allowed and the impugned Ruling rendered on the September 13, 2023, together with the consequential orders be and are hereby set aside.
101. As pertains to costs, same ordinarily follow the event unless there is a proven and established deviant factor to the contrary, which is not the case herein. Consequently, costs be and are hereby awarded to the Appellant.
102. It is so ordered.

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

OGUTTU MBOYA

JUDGE.

In the Presence of;

Travis - Court Assistant.

Mr. Solomon Opole for the Appellant.

Mr. Mageto for the Respondent.

