



**Hasmo Agencies Limited v National Social Security Fund (Environment & Land Case E052 of 2023) [2024] KEELC 1284 (KLR) (7 March 2024) (Ruling)**

Neutral citation: [2024] KEELC 1284 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT & LAND CASE E052 OF 2023**

**OA ANGOTE, J**

**MARCH 7, 2024**

**BETWEEN**

**HASMO AGENCIES LIMITED ..... PLAINTIFF**

**AND**

**NATIONAL SOCIAL SECURITY FUND ..... DEFENDANT**

**RULING**

1. The Plaintiff has filed a Notice of Motion Application dated 9<sup>th</sup> November 2023 in which it seeks the following orders, that:
  - a. This Honourable Court be pleased to grant the Plaintiff leave to commence contempt of court proceedings against the Managing Trustee David Koros, Head of Legal Hellen C. Koech, Property Manager Obed Mbuvi and the Head of Security Isaac Tuei Koskei for failure to comply with this Honourable Court's orders given on 14<sup>th</sup> and 15<sup>th</sup> August 2023.
  - b. This Honourable Court be pleased to grant leave to the Plaintiff to apply for an order of sequestration, attachment and sale of the property of the Managing Trustee David Koros, Head of Legal Hellen C. Koech, Property Manager Obed Mbuvi and the Head of Security Isaac Tuei Koskei, officers of the Defendant.
  - c. The Chief Executive Officer of the Defendant one Davis Koros be summoned to court to personally explain the contempt.
  - d. Costs be provided for.
2. This application is supported by the grounds set out in the annexed Statement and the Affidavit of Hassan Mohamed Abdirahman, a Director of the Plaintiff, in which he deposed that the Plaintiff is the lawful tenant and occupier of the property described as L.R. Nos 209/11412, 209/11331, 209/12220, 209/122219 and 209/12287 comprising 455 parking slots along Kenyatta Avenue, Nairobi.



3. Mr. Abdirahman deponed that the Plaintiff, through an application dated 10<sup>th</sup> August 2023, sought this court's intervention to have the Defendant enjoined from interfering with the Plaintiff's right to quiet and peaceful possession of the suit premises, by parking several motor vehicles, and these motor vehicles are Registration Numbers KCP 699K, KDA 466P, KCK 598U, KCN 899C, KCE 970D, KBB 760G, KCT 717Y, KDE 831R and KDG 306J, which are parked at the entrances of the suit premises thereby blocking and denying the Plaintiff's customers access to the suit premises.
4. It was deposed that on 14<sup>th</sup> and 15<sup>th</sup> August 2023, the court decreed that pending the hearing of the application inter partes on 25<sup>th</sup> January 2023, a temporary injunction do issue prohibiting the Defendants from erecting a blockade and/or obstruction through the aforementioned Defendant's vehicles at the entrances of the suit premises and restraining the Defendant from interrupting the Plaintiff's use, occupation, enjoyment of the property and the Plaintiff's business at the Carpark at Kenyatta Avenue Nairobi on the suit properties.
5. The Plaintiff averred that the matter came up on 25<sup>th</sup> September 2023 and 31<sup>st</sup> October 2023; that the Defendant was duly represented by her Counsel when the interim orders were extended and that the said orders given on 14<sup>th</sup> and 15<sup>th</sup> August 2023 still subsists and have not been set aside, reviewed, varied and/or discharged.
6. The Plaintiff stated that despite knowledge of the existence of the order and attempts of the Plaintiff to protect their rights to enjoy peaceful and quiet possession of the suit property, the Defendant has persisted in erecting a blockade and/or obstruction at the entrance of the suit premises using her motor vehicles.
7. It was deponed that David Koros, Hellen Koech, Obed Mbuvi and Issac Tuei Koskei in their capacities as officers of the Defendant have neglected and/or willfully refused to comply with the orders of this court, and continue to cause several motor vehicles to be stationed at the entrances of the suit premises.
8. The Respondent filed a Replying Affidavit sworn by Ms. Hellen Koech, the Defendant's Legal Manager, who deposed that she has the authority of David Koros, Obed Mbuvi, Isaac Tuei Koskei to swear the Affidavit on their behalf.
9. Ms. Koech deposed that the Defendant is the registered proprietor of the suit properties and that the Applicant is a vexatious litigant who is keen in abusing the due process by instituting multiple actions against the Defendant in different courts and forums on the same subject matter.
10. She deponed that through an application dated 11<sup>th</sup> August 2023, the Plaintiff filed a similar motion for contempt of court against the Defendant seeking similar orders in Milimani Chief Magistrates Court Case No. E358 of 22 Hasmo Agencies Limited vs National Social Security Fund and this suit is still active.
11. Ms. Koech urged that in the Defendant's application dated 16<sup>th</sup> August 2023, the Plaintiff failed to disclose that it had on 1<sup>st</sup> June 2023 filed a reference and Notice of Motion application in Nairobi Business Premises Rent Tribunal Case No. E558 of 2023 Hasmo Agencies Limited vs National Social Security Fund and that prayer 4, the Plaintiff had sought for an order to be restored into the suit premises, indicating that the Plaintiff was never in possession of the Defendant's premises.
12. Ms. Koech stated that on 26<sup>th</sup> June 2023, the Tribunal suspended the orders granted in the Plaintiff's favor due to material non-disclosure and that the Plaintiff was therefore never restored into the suit premises, a position that has obtained to date and that the Tribunal ordered its Rent Inspector to visit the suit premises and file a report, which visit was conducted on 21<sup>st</sup> July 2023. It was deponed that the Rent Inspector reported that the Plaintiff was not in occupation of the suit premises.



13. It was deposed that the Notice of Withdrawal at the Tribunal was only filed on 16<sup>th</sup> August 2023 and served on the same date, after the Plaintiff had obtained injunctive orders in this court and that the Tribunal adopted the Notice of Withdrawal and the case was withdrawn on 28<sup>th</sup> August 2023 with costs to the Defendant.
14. Ms. Koech stated that this background is so that the court may appreciate the insincerity and malice of the Plaintiff in bringing this application; that the Plaintiff failed to disclose that it was not in possession of the suit properties and misled the court into issuing orders on account of an erroneous set of facts and that the Plaintiff has attempted to use the injunctive orders as restorative orders to gain re-entry into the suit premises, which is not the legal effect of the orders in force.
15. It is the Respondent's case that the orders are impractical to comply with and as such, the Defendant has not deliberately declined to obey the court orders.
16. The Plaintiff filed a Further Affidavit and sworn by the Plaintiff's director, Hassan Mahamed Abdirahman, who deposed that the Defendant has failed to tender any response or defence against the contempt proceedings against them and that this court should proceed with the sentencing of the contemnors for their contemptuous actions.
17. According to Mr. Abdirahman, contempt proceedings are quasi-criminal in nature and are to proceed in personam; that a person accused of contempt cannot delegate or authorize another person to put forth a defence on their behalf; and that the authority to swear purported to have been issued herein is erroneous, fatally defective and is unknown in law.
18. According to the deponent, the Defendant has refused to obey this court's orders and continues to erect a blockade at the entrance of the suit premises using its vehicles. He stated that the terms of the orders issued by the court are clear and there is no contention on the compliance that was expected of the Defendant; that the Defendant has full knowledge of the orders and that they were duly served.
19. Mr. Abdirahman urged that the Defendant's action is deliberate and meant to infringe upon the Plaintiff's right to possession of the suit property; that the allegations that the Plaintiff is not in possession of the suit property are false and are a misrepresentation of the facts and that at the time of issuance of this court's orders on 14<sup>th</sup> and 15<sup>th</sup> August 2023, the Plaintiff was in possession and occupation of the suit property undertaking car parking management business.
20. Additionally, Mr. Abdirahman stated that on 30<sup>th</sup> June 2023, the Defendant instituted Miscellaneous Application No. E179 of 2023 National Social Security Fund vs Hasmo Agencies Ltd attempting to evict the Plaintiff and that in the application, the Defendant admits that the Plaintiff is in possession and occupation of the suit property, carrying out a carpark management business.
21. The Plaintiff's Director averred that the Defendant illegally instituted a frivolous suit against a fictitious third party being ELC LC Case No. E021 of 2023 National Social Security Fund v Marting Ngige; that through misrepresentation of facts and hoodwinking the court, the Defendant obtained interim orders of injunction against the fictitious person and that in bad faith and malicious conduct, the Defendant procured the assistance of a police officer and on 21<sup>st</sup> July 2023, unsuccessfully attempted to evict the Plaintiff.
22. It was the deponent's case that even where a party is contesting an order of court, the law obligates him to abide by the said order and that the Defendant's challenge against the orders dated 14<sup>th</sup> and 15<sup>th</sup> August 2023 does not qualify it to act in utter disdain and blatant disobedience of the said orders. The parties made oral submissions which I have considered.



## Analysis and Determination

23. While the parties have robustly argued as to the applicability of the orders of the court and as to whether the Defendant or the Plaintiff is in possession of the suit property, these arguments are not for this court's consideration at this stage. Those arguments ought to be raised in an application seeking to vary or set aside the orders of the court. The issue for this court's determination is whether the Defendant's officers are in contempt of this court's orders.
24. The power of a court to hold a party in contempt is for the purpose of upholding the rule of law. That is what was stated in *Teachers Service Commission vs Kenya National Union of Teachers & 2 Others* [2013] eKLR as follows:
- “The reasons why the Courts will punish for contempt of Court then is to safeguard the rule of law which is fundamental in the administration of justice. It has nothing to do with the integrity of the judiciary or the Court or even the personal ego of the presiding judge...it is about preserving and safeguarding the rule of law.”
25. Under Section 29 of the *Environment and Land Court Act*, the Environment and Land Court has been expressly clothed with jurisdiction to punish for contempt of court. This is in concurrence with Section 5 (1) of the *Judicature Act* that vests in the superior courts the power, like those of the High Court of Justice in England, to punish any party who violates its orders.
26. Section 29 of the *Environment and Land Court Act* prescribes that it is an offence to refuse, fail or neglect to obey an order or direction of the court given under the Act. The section reads as follows:
- “Any person who refuses, fails or neglects to obey an order or direction of the Court given under this Act, commits an offence, and shall, on conviction, be liable to a fine not exceeding twenty million shillings or to imprisonment for a term not exceeding two years, or to both.”
27. It is critical to note that the standard of proof in contempt matters is higher than that of ordinary civil matters. In the case of *Mutitika vs Baharini Farm Limited* [1985] KLR 229, 234, the Court of Appeal held that:
- “In our view, the standard of proof in contempt proceedings must be higher than proof on the balance of probabilities, almost but not exactly, beyond reasonable doubt...The standard of proof beyond reasonable doubt ought to be left where it belongs, to wit, in criminal cases. It is not safe to extend it to an offence which can be said to be quasi-criminal in nature. The rationale for this standard is that if cited for contempt, and the prayer sought is for committal to jail, the liberty of the contemnor will be affected. As such, the standard of proof is higher than the standard in civil cases. This power, to commit a person to jail, must be exercised with utmost care, and exercised only as a last resort. It is of utmost importance, therefore, for the respondents to establish that the alleged contemnor's conduct was deliberate, in the sense that he or she willfully acted in a manner that flouted the Court Order.”
28. This then means that the violation for which an alleged contemnor is cited must not only be precisely defined, but also be proved to a standard which is higher than proof on a balance of probabilities, but not as high as proof beyond reasonable doubt.
29. This court in *Sheila Cassatt Issenberg & Another vs Antony Machatha Kinyanjui* [2021] eKLR, citing *Carey vs Laiken*, 2015 SCC 17 (16th April 2015), where Cromwell J, writing for the Supreme Court



of Canada expounded on the three elements of civil contempt of court which must be established to the satisfaction of the court, thus:-

- “(i) The order alleged to have been breached “must state clearly and unequivocally what should and should not be done.” This ensures that a party will not be found in contempt where an order is unclear. An order may be found to be unclear if, for example, it is missing an essential detail about where, when or to whom it applies; if it incorporates overly broad language; or if external circumstances have obscured its meaning.
- (ii) The party alleged to have breached the order must have had actual knowledge of it. It may be possible to infer knowledge in the circumstances, or an alleged contemnor may attract liability on the basis of the willful blindness doctrine.
- (iii) The party alleged to be in breach must have intentionally done the act that the order prohibits or intentionally failed to do the act that the order compels.”

30. In similar vein, in *North Tetu Farmers Company Ltd vs Joseph Nderitu Wanjohi* [2016] eKLR, the court relied on the text titled ‘Contempt in Modern New Zealand’ which provides as follows:

“There are essentially four elements that must be proved to make the case for civil contempt. The applicant must prove to the required standard (in civil contempt cases which is higher than civil cases) that:-

- (a) the terms of the order (or injunction or undertaking) were clear and unambiguous and were binding on the defendant;
- (b) the defendant had knowledge of or proper notice of the terms of the order;
- (c) the defendant has acted in breach of the terms of the order; and
- (d) the defendant’s conduct was deliberate.”

31. This court is guided accordingly. It must therefore measure the Plaintiff’s case against the legal standards set out above.

32. The orders in issue in this case are those dated 14<sup>th</sup> and 15<sup>th</sup> August 2023. The orders issued on 14<sup>th</sup> August 2023 and dated 15<sup>th</sup> August 2023 read as follows:

“That until 25<sup>th</sup> September 2023, an order of injunction is hereby issued prohibiting the Defendant from erecting a blockade and/or obstruction, being motor vehicles Registration Number KCP 699K, KDA 466P, KCK 598U, KCN 899C, KCE 970D, KBB 760G, KCT 717Y, KDE 831R and KDG 306J all belonging to/ the Defendant or any Motor Vehicle belonging to the Defendant, at the entrances of the premises housing the CARPARK AT KENYATTA AVENUE NAIROBI on L.R. No. 209/11412, L.R. No. 209/11331, L.R. No. 209/12220, L.R. No. 209/12219 and L.R. No 209/12287 as parking bay along Kenyatta Avenue comprising 455 parking lots.”

33. The orders issued by this court on 15<sup>th</sup> August 2023 and dated 16<sup>th</sup> August 2023 reads as follows:

“That until 25<sup>th</sup> September 2023, in addition to the orders issued on 14<sup>th</sup> August 2023, an order of injunction is hereby issued to restrain the Defendant whether by herself or through her agents, servants or employees or howsoever else from erecting a blockade,



obstructing, entering upon, remaining upon, trespassing, damaging, wasting, removing, disposing of, selling, advertising, inviting tenders, receiving bids, evaluating bids, awarding and/or appointing managers, closing and/or shutting down, attaching, distressing, or in other way whatsoever evicting, harassing, intimidating, threatening, interfering and/or interrupting the Plaintiff's quiet use, possession, occupation management and enjoyment of the property and the Plaintiff's business at the Carpark at Kenyatta Avenue Nairobi on L.R. No. 209/11412, L.R. No. 209/11331, L.R. No. 209/12220, L.R. No. 209/12219 and L.R. No 209/12287 as parking bay along Kenyatta Avenue comprising 455 parking lots.”

34. The Plaintiff averred that the matter came up on 25<sup>th</sup> September 2023 and 31<sup>st</sup> October 2023. It was deposed that the Defendant was duly represented by her Counsel when the interim orders were extended. The said orders of 14<sup>th</sup> and 15<sup>th</sup> August 2023 still subsists and have not been set aside, reviewed, varied and/or discharged.
35. There is no dispute that the orders of the court orders issued on 14<sup>th</sup> and 15<sup>th</sup> August 2023 are clear and unambiguous. These orders restrained the Defendant from parking its cars at the entrances of the suit premises, which is a parking bay.
36. The second element is whether the Defendant had proper notice of the terms of the orders. The Plaintiff's Counsel has filed an Affidavit of Service dated 18<sup>th</sup> August 2023. Mr. Shikanda averred that he received copies of the court orders issued on 14<sup>th</sup> August 2023 and 15<sup>th</sup> August 2023, which he served upon the Defendant herein. Mr. Shikanda annexed to the Affidavit of Service copies of the orders, which are stamped by the Defendant as received.
37. The named contemnors have not challenged the Affidavit of Service or asserted that they had no notice as to the terms of the court orders.
38. In support of the application, the Plaintiff has annexed several photographs of vehicles parked in front of an entrance. The photographs dated 3<sup>rd</sup>, 9<sup>th</sup> and 17<sup>th</sup> October 2023 show that Motor Vehicle Registration No. KDA 466P was parked in a manner that restricted access to the suit property. Other Motor Vehicles indicated in the photographs include KBZ 296G, KBZ 097A, KCW 899C, KCK 565U.
39. The Defendant has not denied that indeed they have blocked the entrance to the suit property. According to the Defendant's legal manager, the Defendant could not obey the court orders because the Plaintiff was not in possession of the suit property as at the time the orders were issued. In a nut shell, the Defendant's position was that the orders as framed were incapable of being obeyed.
40. As stated above, the order of this court clearly prohibited the Defendant from erecting a blockade, obstructing, entering upon, remaining upon, trespassing et el on the suit property. The Defendant's officials have declined to obey the said orders because they believe the orders should not have been issued in the first place.
41. In brief, the Defendant has abrogated itself the mandate of interpreting the orders of the court. That is unacceptable. Until the orders of this court are set aside, discharged or varied, they must be obeyed. Having declined to obey the orders of this court, it is the finding of the court that the Defendant's officials are in contempt of the orders of this court of 14<sup>th</sup> and 15<sup>th</sup> August, 2023.
42. Consequently, the Plaintiff's application dated 9<sup>th</sup> November 2023 is allowed as follows:



- a. The Defendant's Managing Trustee David Koros, Head of Legal Hellen C. Koech, Property Manager Obed Mbuvi and the Head of Security Isaac Twei Koskei are hereby found to be in contempt of the orders of this court of 14<sup>th</sup> and 15<sup>th</sup> August, 2023.
- b. The abovenamed contemnors to appear before the court in person for mitigation and sentencing.
- c. The Defendant to pay the costs of the application.

**DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 7<sup>TH</sup> DAY OF MARCH, 2024.**

**O. A. ANGOTE**

**JUDGE**

**In the presence of;**

Mr. Shikanda for Osondo for Plaintiff

Mr. Mutunga for Defendant

Court Assistant - Tracy

