



**Ubora Housing Co-operative Society Ltd v Tripple Two Properties Ltd & 7 others  
(Civil Application E244 of 2021) [2023] KECA 675 (KLR) (9 June 2023) (Ruling)**

Neutral citation: [2023] KECA 675 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NAIROBI  
CIVIL APPLICATION E244 OF 2021  
MSA MAKHANDIA, J MOHAMMED & HA OMONDI, JJA  
JUNE 9, 2023**

**BETWEEN**

**UBORA HOUSING CO-OPERATIVE SOCIETY LTD ..... APPLICANT**

**AND**

**TRIPPLE TWO PROPERTIES LTD ..... 1<sup>ST</sup> RESPONDENT**

**GEOFREY MAKANA ASANYO ..... 2<sup>ND</sup> RESPONDENT**

**MISORI CONSTRUCTION COMPANY LTD ..... 3<sup>RD</sup> RESPONDENT**

**ZABLON MABEA ..... 4<sup>TH</sup> RESPONDENT**

**THE NATIONAL LAND COMMISSION (FORMERLY THE COMMISSIONER  
OF LANDS) ..... 5<sup>TH</sup> RESPONDENT**

**THE HONOURABLE ATTORNEY GENERAL ..... 6<sup>TH</sup> RESPONDENT**

**ANCUT MUUMBI MUNYAO ..... 7<sup>TH</sup> RESPONDENT**

**PETER NZYIMI MUTUA ..... 8<sup>TH</sup> RESPONDENT**

*(An application for contempt proceedings against the 1st & 2nd  
respondents for disobeying this Court's Order (J. Mohammed, Mbogholi  
& Omondi, J.J.A.) issued on 8th September, 2021 and 22nd October, 2021)*

**RULING**

1. The applicant has approached this Court by way of a notice of motion dated 18<sup>th</sup> October, 2022 brought under section 5 of the Judicature Act, Part 10 and 81 of the English Civil Procedure (Amendment No. 2) Rules, 2012 and rule 12 of the Court of Appeal Rules seeking orders that Caroline Makana in her capacity as a director of the 1<sup>st</sup> respondent and Geoffrey Makana Asanyo, the 2<sup>nd</sup> respondent be committed to civil jail for such period as this Court may deem fit and just for



disobedience of the orders of this Court issued on 22<sup>nd</sup> October 2022. There is also an antecedent prayer for costs to be met by the 1<sup>st</sup> and 2<sup>nd</sup> respondents.

2. The application is premised on the grounds, that the applicant filed a notice of motion dated 9<sup>th</sup> July, 2021 before this Court seeking that the 1<sup>st</sup> to 6<sup>th</sup> respondents, their servants, agents or any person acting under their authority be restrained from evicting the applicant or its members, trespassing selling, entering, encroaching, alienating and/or destroying the property known as LR No 337/1631 (1 R NO74968) situate in Mavoko Municipality, Machakos County “the suit property”, pending the hearing and determination of the appeal which order was granted on 22<sup>nd</sup> October, 2021.
3. That the 1<sup>st</sup> and 2<sup>nd</sup> respondents were aware of the said orders as they were duly served. However, the existence of the said orders notwithstanding, the 1<sup>st</sup> respondent had approached and coerced one of the applicant’s members, one Mr. Mugambi into signing a Sale Agreement or face eviction. Further, they had threatened to evict the applicant’s members and their families and demolish their structures on the suit property. The 2<sup>nd</sup> respondent had also proceeded to transfer the suit property to an entity known as Ngara Estate Property Limited through which it had subdivided the suit property and was in the process of transferring the same to third parties. That these acts by the 1<sup>st</sup> and the 2<sup>nd</sup> respondents were indeed contemptuous of the authority of this Court. That the applicant will be highly prejudiced if the said respondents were allowed to deal with the suit property in the manner above. Lastly, that it was imperative that this Court intervenes forthwith to ensure the protection of the sanctity and respect of court orders.
4. The application was further supported by the affidavit of Joseph Matu Gachanja, the Chairman of the applicant who deposed that the transfer of the suit property to third parties was undertaken with the sole intention of defeating the appeal that had been filed. That the 2<sup>nd</sup> respondent who is the father to Caroline Makana, one of the Directors of the 1<sup>st</sup> respondent, had been calling members of the applicant and directing them to either purchase the suit property from Ngara Estate Property Limited or pay rent to the said entity. That the 1<sup>st</sup> and 2<sup>nd</sup> respondents had continued to construct a perimeter wall and other structures on the suit property. The same sentiments were echoed in the supporting affidavits of Kelvin Mugambi Januarius and Martha Makori, all dated 26<sup>th</sup> February, 2023.
5. The application was opposed by the 1<sup>st</sup> and 2<sup>nd</sup> respondents through a replying affidavit dated 31<sup>st</sup> October, 2022 and a further affidavit dated 7<sup>th</sup> March, 2023 by one Caroline Makana. She deposes that she was aware of the suit that was filed by the applicant in 2010 against the 1<sup>st</sup> and 2<sup>nd</sup> respondents, which suit was dismissed, necessitating the applicant to appeal to this Court. Thereafter, the applicant filed an application under rule 5(2)(b) of this [Courts rules](#) for an injunction which was granted on the 22<sup>nd</sup> October, 2021.
6. However, the injunction was granted when the suit property had already been transferred and registered in the name of Ngara Estate Property Limited on 18<sup>th</sup> June, 2021. That the process was undertaken immediately after the judgment of the High Court dismissing the applicant’s suit was delivered on the 16<sup>th</sup> June, 2021. That the applicant filed the application for injunction without carrying out due diligence to establish the status of the suit property. As such, the orders that were granted by this Court emanating from the said application were in vain since the events on the ground had changed, the suit property having already changed hands. The fact that the suit property had changed hands was even acknowledged by the applicant in its affidavits and submissions, and so was the subdivision and construction of the perimeter wall. Thus, any actions taken by the current owner of the suit property and who is not a party to this application, and indeed, the appeal cannot be visited on the 1<sup>st</sup> and 2<sup>nd</sup> respondents.



7. The 1<sup>st</sup> and 2<sup>nd</sup> respondents maintain that the application was made in bad faith and with non-disclosure of material facts aimed at misleading this Court. That even though an order was issued, the suit property had by then changed ownership to Ngara Estate Property Limited which information was with the applicant before filing the application. That Ngara Estate Property Limited was not aware of the alleged orders that are said to have been disobeyed by the 1<sup>st</sup> and the 2<sup>nd</sup> respondents.
8. It is the 1<sup>st</sup> and 2<sup>nd</sup> respondents' case that there were no threats directed at Mugambi by them as they had no authority to do so, since the suit property does not belong to them anymore. That if the said Mugambi had entered into a sale agreement with the current owner, then the same was undertaken voluntarily and willingly without the involvement of the 1<sup>st</sup> and 2<sup>nd</sup> respondents. That the suit property had long been subdivided and new titles issued which fact was admitted to by the applicant. Further, that there is no dispute as to the new owner of the suit property, thus, it boggles one's mind how the 1<sup>st</sup> and 2<sup>nd</sup> respondents can be cited for contempt for acts over a suit property that does not belong to them.
9. It is the 1<sup>st</sup> and 2<sup>nd</sup> respondents' further case that the applicant's remedy, if any, lies in the recovery of the purchase price from the party who purported to sell the suit property to them as they did not have any good title to pass to the applicant. Lastly, that there was no order that was extracted and served on them, and, in any case, the orders referred to seem to be several and the applicant is not clear as to which order was breached. On one hand, it claims that the order breached was that of 8<sup>th</sup> September 2021 (the *status quo* order) and on the other hand, it claims it is the order of 22<sup>nd</sup> October 2021, (the injunction order). Hence, the application does not meet the threshold for grant of the prayers sought.
10. When the application came up for hearing before us, Mr. Anyoka, learned counsel for the applicant informed us that parties had agreed to rely entirely on their respective written submissions on record and they did not wish to highlight.
11. According to the applicant, this Court issued a *status quo* order on 8<sup>th</sup> September, 2021 which order was clear and unambiguous in terms that the applicant and its members were to remain in possession of the suit property. The order was interim pending the ruling of the Court on 22<sup>nd</sup> October, 2022. However, despite the 1<sup>st</sup> and 2<sup>nd</sup> respondents being aware of this order, as they were represented by an advocate, they had issued threats to evict the applicant's members and their families and demolish their structures. Further, they proceeded to transfer the suit property to Ngara Estate Property Limited through which the 2<sup>nd</sup> respondent had caused the subdivision into small plots and transferred them to different persons.
12. The applicant relied on the case of *Shimmers Plaza Limited v National Bank of Kenya Limited* (2015) eKLR for the proposition that a court order made in the presence of counsel for the respondent must be deemed that the respondent is aware of it. Further reliance was placed on this Court's decision in the case of *Justus Kariuki Mate & another v Martin Nyaga Wambora & another* (2014) eKLR for the proposition that personal service of the orders was no longer a requirement in contempt proceedings as proof of the respondent's knowledge of the existence of the said order was sufficient. It was the applicant's further submission that the 1<sup>st</sup> and 2<sup>nd</sup> respondents acted in total breach of the order when they transferred the suit property to Ngara Estate Property Limited. This conduct by the 1<sup>st</sup> and 2<sup>nd</sup> respondents and Caroline Makana respectively, were deliberate for though they were aware of the order of the Court, they chose to willfully ignore the same for which they ought to be punished.
13. On their part, the 1<sup>st</sup> and 2<sup>nd</sup> respondents submitted that when the order was issued, the suit property had already changed ownership. That the High Court judgment was delivered on 16<sup>th</sup> June, 2021 and the suit property was transferred to Ngara Estate Property Limited on 18<sup>th</sup> June, 2021. Hence, the



orders of 8<sup>th</sup> September, 2021 and 22<sup>nd</sup> October, 2022 had been overtaken by events as things had already changed on the ground. That for the applicant to succeed in an application of this nature, it had to prove that the terms of the order were clear and unambiguous, that there was knowledge of the said order by the respondents and that failure by the respondents to comply with the said terms of the order was intentional, wilful and deliberate. None of the above had been proved in this application.

14. That it was not even clear which order the respondents had disobeyed. This could be discerned from prayer 2 of the application in which it refers to an injunction order issued on 22<sup>nd</sup> October 2022, while in the supporting affidavit, it makes reference to an order issued on 22<sup>nd</sup> October 2021, and in the index of documents refers to a *status quo* order issued on the 8<sup>th</sup> of September, 2021. That both orders of 22<sup>nd</sup> October, 2022 and 8<sup>th</sup> September, 2021 are foreign to the 1<sup>st</sup> and 2<sup>nd</sup> respondents. That even assuming that the orders referred to were indeed issued, they had already been overtaken by events as the suit property had changed hands to Ngara Estate Property Limited as exhibited by the official search certificate annexed to the affidavit by the 1<sup>st</sup> respondent. That the orders said to have been disobeyed do not refer to any property that belonged to the persons said to be in contempt. Further, in the alleged agreement that had been annexed to the application, nowhere do the 1<sup>st</sup> and 2<sup>nd</sup> respondents feature.
15. We have considered the application, the rival affidavits, submissions of both counsel and the law. The prevailing provisions that guide the Court in such an application are found in section 5 of the [Judicature Act](#) which provides inter alia:

“Contempt of court

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.”
16. In the case of [Wambora \(supra\)](#), the Court had opportunity to interpret and apply section 5 of the [Judicature Act](#) and made the following observations:

“It is imperative in considering this issue to take into account the applicable law and the governing principles in contempt proceedings. As correctly pointed out by this Court in [Christine Wangari Gachege v Elizabeth Wanjiru Evans & 11 Others](#), - Civil Application No. 233 of 2007 the statutory basis of contempt of court in so far as the Court of Appeal and the High Court are concerned is Section 5 of the [Judicature Act](#) and Section 63(c) of the [Civil Procedure Act](#). Of relevance to this case is Section 5 of the [Judicature Act](#) which provides:

- (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 that 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 exercise of the original criminal jurisdiction of the High Court.” (Emphasis added)



Based on the foregoing provision, the applicable law in contempt proceedings in Kenya is the law applicable in the High Court of Justice in England at the time the application for contempt was filed.”

Contempt proceedings are quasi-criminal in nature as the liberty of an individual is at stake. The standard of proof is therefore higher than in civil proceedings. It is not on a balance of probabilities though not beyond reasonable doubt as required in Criminal Proceedings.

17. This principle was reiterated in the case *Gatharia K. Mutikika v Babarini Farm Ltd* (1985) KLR 227 and cited in the case *Katsuri Ltd v Kapurchand Depar Shali* (2016) eKLR whereof it was stated:

“The courts take the view that where the liberty of the subject is, or might be involved, the breach for which the alleged contemnor is cited must be precisely defined. A contempt of court is an offence of a criminal character. A man may be sent to prison. It must be satisfactorily proved it must be higher than proof on a balance of probabilities, almost, but not exactly, beyond reasonable doubt.”

The said Court proceeded to add, thus:

“the guilt has to be proved with such strictness of proof as is consistent with the gravity of the charge “

18. On the face of it, would appear that the orders of Court issued on the two occasions were clear and unambiguous, and were directed at the respondents. However, going by what was the reality on the ground at the time, the suit property having already transferred to Ngara Estate Property Limited, the orders obviously turn out to be ambiguous. There also seems to be confusion as to which order the application is premised upon as at one point, there is the order of *status quo* being referred to and the order of injunction issued on 22<sup>nd</sup> October 2022, being referred to in the same breath. That notwithstanding, it is apparent that as at the time the two orders were made, the suit property had already changed hands, subdivisions undertaken, transfers to third parties effected and a perimeter wall constructed. Indeed, these facts were even acknowledged by the applicant in its affidavits as well as written submissions. Either way, there was no specific order requiring the said respondents not to transfer the suit property as the transfer had already been effected to Ngara Estate Property Limited.
19. Would the knowledge of the judgment or order by the advocate of the alleged contemnor suffice for contempt proceedings? We hold the view that it does. This is more so in a case such as this one where the advocate was in Court representing the alleged contemnors and the orders were made in his presence. There is an assumption which is not unfounded, and which in our view is irrefutable to the effect that when an advocate appears in court on instructions of a party, then it behooves him/her to report back to the client all that transpired in Court that has a bearing on the client’s case.
20. In the circumstances of this case, depending on the orders that the applicant wishes to enforce, and particularly, if it was one of *status quo*, it was important to define what *status quo* meant. We must mention however, that when the orders were made, none of the parties sought any clarification from the Court as to what the status quo entailed at the time. “Status quo” in normal English parlance means the present situation, the way things stand as at the time the order is made, the existing state of things. It cannot therefore relate to the past or future occurrences or events.
21. All it meant was that everything remains as it was as at the time that the order was made. If there was any transaction of whatever nature that was going on in respect of the suit property, it was frozen until the order was discharged, varied rescinded and or lifted. The agreement of sale annexed by the applicant



was denied by the 1<sup>st</sup> and 2<sup>nd</sup> respondents as they were not parties to the said agreement. They cannot therefore be held in contempt of Court on that account. There is nothing on record that shows that after the grant of the orders of this Court, the 1<sup>st</sup> and 2<sup>nd</sup> respondents proceeded to deal with the suit property in a manner contrary to the said court orders. Further, even if it was the order of injunction issued on 22<sup>nd</sup> October 2021, we do not see how they can be held to account for actions of the owner of the suit property that does not belong to them.

22. Were the respondents therefore in contempt of Court? It cannot be gainsaid that the duty to obey the law by all individuals and institutions is paramount in the maintenance of the rule of law, good order and the due administration of justice.

23. As stated by Romer, L.J. In *Hadkinson v Hadkinson*, (1952) ALL ER 567:

“It is the plain and unqualified obligation of every person against, or in respect of, whom an order is made by a court of competent jurisdiction to obey it unless and until that order is discharged. The uncompromising nature of this obligation is shown by the fact that it extends even to cases where the person affected by an order believes it to be irregular or even void. Lord Cottenham, L.C., said in *Chuck v Cremer* (1) (1 Coop. temp.Cott 342):

“A party, who knows of an order, whether null or valid, regular or irregular, cannot be permitted to disobey it... It would be most dangerous to hold that the suitors, or their solicitors, could themselves judge whether an order was null or valid-whether it was regular or irregular. That they should come to the court and not take upon themselves to determine such a question. That the course of a party knowing of an order, which was null or irregular, and who might be affected by it, was plain. He should apply to the court that it might be discharged. As long as it exists it must not be disobeyed.”

24. We ask ourselves if the respondents were such persons? The answer to this question is not in the affirmative. We agree that the orders were or may have been made in the presence of counsel for the respondents whom as stated earlier must be presumed to have informed the respondent of the same. The orders issued were however incapable of being enforced against the 1<sup>st</sup> and 2<sup>nd</sup> respondents as the suit property had already been transferred to Ngara Estate Property Limited, and who was and had never been made a party to this application and or the appeal.

25. There is no blanket requirement for compliance of any court order by a non party to the said order. Given the foregoing, who would then restrict the new owner from causing developments on his/its/her land? It remains a wonder therefore how we would hold a party who is not the owner of the suit property in contempt over the dealings of a third party and who is not party to the proceedings and owns the suit property.

26. In the premises and for the foregoing reasons, we dismiss the application dated 18<sup>th</sup> October, 2022 with costs to the 1<sup>st</sup> and 2<sup>nd</sup> respondents.

**DATED AND DELIVERED AT NAIROBI THIS 9<sup>TH</sup> DAY OF JUNE, 2023.**

**ASIKE-MAKHANDIA**

.....

**JUDGE OF APPEAL**

**JAMILA MOHAMMED**



.....  
**JUDGE OF APPEAL**

**H. A. OMONDI**

.....  
**JUDGE OF APPEAL**

*I certify that this is a True copy of the original*

*Signed*

**DEPUTY REGISTRAR**

