Shigog (Through His Attorney Anwar Saleh Shigog) v Malindi Water & Sewerage Company (MAWASCO) & 3 others (Environment & Land Case 66 of 2022) [2024] KEELC 3604 (KLR) (25 April 2024) (Ruling)

Neutral citation: [2024] KEELC 3604 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MALINDI

ENVIRONMENT & LAND CASE 66 OF 2022

EK MAKORI, J

APRIL 25, 2024

BETWEEN

SALEH MUHSIN SHIGOG (THROUGH HIS ATTORNEY ANWAR SALEH SHIGOG) ..... APPLICANT

AND

MALINDI WATER & SEWERAGE COMPANY (MAWASCO) . 1ST RESPONDENT

OMARI PROJECT ..... 2ND RESPONDENT

CABINET SECRETARY, MINISTRY OF LANDS & PHYSICAL PLANNING ..... 3RD RESPONDENT

THE ATTORNEY GENERAL ..... 4TH RESPONDENT

RULING

1. The application dated 29th August 2023 seeks to have the Managing Director of the 1st defendant/ respondent cited for contempt for disobeying the orders of this Court issued on 1st of March 2023 and served upon the 1st respondent on 3rd March 2023 restraining the respondents from building on plot No.2078 (Original No. 422/4) Malindi pending the hearing and determination this suit. The order should be issued against the Managing Director of the 1st respondent for knowingly and intentionally disobeying orders of this Court. Unless the contempt is purged, to the satisfaction of this Court, then the 1st respondent ought not to be heard by this Court in these proceedings. The 1st respondent will bear the costs of the application.

2. The issue(s) then that fall for the determination of this Court is whether this Court should cite the 1st respondent through its Managing Director for contempt, with the attendant costs.

3. The Court directed the parties to file written submissions. I now propose to deal with the said issue(s) based on the materials placed before me.

4. The applicants averred that the orders issued by this Court were well known to the 1st respondent. The orders were issued on 6th December 2022 and extended on 31st January 2023 in the presence of the 1st and 2nd respondents and confirmed on 1st of March 2023 which orders were as follows:

> " That the respondents be and are hereby restrained from building on plot No. 2078 original No. 422/4 Malindi pending the hearing of the suit"

5. The applicant contends that the orders were issued in the presence of Mr. Faraj, Counsel for the first defendant; hence, the second and third respondents were well aware of those orders.

6. The applicants submitted that despite the issuance and knowledge of those orders, the first respondents deliberately proceeded with the construction on the suit property, as evidenced by the photographs exhibited.

7. The applicant states the application is merited and should be allowed. The applicant cites judicial precedents to guide this Court in determining whether to punish for contempt and the reasons why punish for contempt – see *Samuel M. N. Mweru & Others v National Land Commission & 2 Others* [2020] eKLR, *Sheila Cassatt Issenberg & Another v Anthony Machatha Kinyanjui* [2021] and *Soloh Wolrwide Inter-Enterprise v County Secretary Nairobi County & Another* [2016] eKLR.

8. The 1st respondent opposed the application and contended through a replying affidavit deposed on 11th October 2023 by Isaac Chibule - its Technical Manager, stating that there was no disobedience of the Court orders as at the time the orders were issued, the building had already been completed, as noted by one Gerald Mwambire who was the then the Managing Director of the 1st respondent as shown in paragraph 9 of his witness statement. Mr. Chibule contends that when the alleged violations happened, he was not in office then serving actively as the Managing Director for the 1st respondent but was on compulsory leave.

9. It is averred in submissions by the 1st respondent that this Court (the ELC) has no powers to adjudicate and punish for contempt. The 1st respondent quoted Section 29 of the *ELC Act* and Section 131 of the *Penal Code*. The two provisions take away the powers of the Court to deal with criminal matters. The decisions in *Samuel Kamau Macharia v Kenya Commercial Bank & 2 Others* [2012] eKLR, *Karisa Chengo & 2 Others v Republic* [2015] eKLR, *Equity Bank Limited v Bruce Mutie Mutuku T/A Diani Tour & Travel* [2016] eKLR.

10. The first respondent believes that the High Court has jurisdiction as provided under Section 5(1) of the *Judicature Act* and Section 36 of the *High Court (Organization and Administration) Act*. The first respondent states that the decision in *Kenya Human Rights Commission v Attorney General* [2018] eKLR removed this Court's powers to punish contempt.

11. On whether to punish the Managing Director of the 1st respondent, it is contended that the building needed to have been shown at what level it was when the orders were issued. Contempt being quasi-criminal proceedings, the same ought to be proved beyond a reasonable doubt, as held in the cited cases of *Kenya Human Rights Commission v Attorney General* [2018] eKLR and *Henry Musemate Murwa v Francis Owino Principal Secretary Ministry of Public Service, Youth, and Gender Affairs & Another* [2021] eKLR.

12. The first respondent is of the view that before commencing contempt proceedings, the leave of the Court should have been sought first. The decisions in *National Insurance Fund Board of Management*

v Boya Rural Nursing Home Ltd [2007] eKLR, Awadh v Marumbu [2004] KLR, *Godfrey Kilatya & 6 Others v Malindi Municipal Council* [2005] eKLR, *Woburn Estate v Margaret Bashforth* [2016] eKLR and *Samuel N. Mweru & Others v National Land Commission & 2 Others* [2020] eKLR.

13. The first respondent submits that it is not shown on whom the current application was served; the former and current Managing Directors, once they received the orders, downed tools as far as the progression of the construction of that building was concerned. On the mandatory nature of personal service, the following cases were cited - *Woburn Estate v Margaret Bashforth* [2016] eKLR (*supra*), *Kyevaluki Services Ltd v Total Kenya Ltd* [2013] eKLR, the first respondent avers that this was not effected on any of the Managing Directors aforesaid.

14. The first respondent asserts that the failure to personally serve the Managing Director of the first respondent Company rendered the application incompetent, as held in the decision in *Abdiwahab Abdaulah Ali v Governor of Garissa & Another* [2013] eKLR.

15. Regarding whether there was willful disobedience of the orders in place, the first respondent contends that once the orders were issued, there was a stoppage of the ongoing construction, and the Deputy Registrar of this Court visited the site and confirmed the same. This being a public utility, The Managing Director had no business disobeying lawful Court orders for lack of personal interest.

16. The photographs displayed to show ongoing constructions are not accompanied by a certificate on the production of electronic evidence as required by Sections 78 and 106(b) of the *Evidence Act* Cap 80 Laws of Kenya.

17. The first respondent finally submits that the applicant has not proved the alleged contempt on a beyond reasonable doubt basis being a requirement on the burden of proof as echoed in the decisions in *Republic v Abdallah Kahi* [2019] eKLR, *Peter Ngethe Ngari T/A PNN Funeral Services v Standard Group Ltd PLC & Another* [2020] eKLR and *Republic v County Government of Kitui Exparte Fairplan Systems Ltd* [2022] eKLR.

18. Before I deal with the central issue raised in the current application of contempt itself, whether it has been established or not, the 1st respondent has raised the issue that this Court (ELC) has no powers to punish for contempt by dint of Sections 29 of the *ELC Act* and Section 131 of the *Penal Code*. The two provisions take away the powers of this Court to deal with criminal matters like contempt. The decision in *Kenya Human Rights Commission v Attorney General* [2018] eKLR cited by the first respondent that Mwita J. declared unconstitutional the provisions of the *Contempt of Court Act*, No. 46 of 2016 which could have given powers to this Court to punish for contempt.

19. Significantly, what the judge said on the issue of punishing for contempt is that parliament cannot legislate to take away the powers of Courts generally to punish for contempt:

> "Flowing from the above decisions and considering the Articles in our constitution, it is plain that the principle aim of the impugned *contempt of Court Act* to limit the power of courts to punish for contempt violates the letter and spirit of the *constitution* . The Act can only aid but not stifle that power. Where the purpose of legislation is in conflict with the *constitution* that inconsistency renders the legislation or its provisions constitutionally invalid. (Olum and Another v Attorney General - supra). I, therefore, find and hold that as the primary purpose of the *Contempt of Court Act* was to limit the courts' power to punish for contempt, it is inconsistent with the supremacy clause in Articles 2(1), 4(2),159and 160 of the *constitution* and encroaches on the independence of the judiciary."

20. In declaring the impugned Act unconstitutional, I do not see where the Judge limited the powers of the ELC to punish for the disobedience of the orders issued by itself. There is a marked difference in the criminal offences (read - all manner of offences) that can be committed and recognisable under the *ELC Act* as envisaged by Section 29 of the *Act*. I agree that whenever those offences are committed, a person needs to be processed under the Criminal Justice System – in a Criminal Court with jurisdiction. If all applications of contempt of the orders of the ELC in civil matters were to be processed in the manner suggested by the 1st respondent before the High Court, I cannot fathom the confusion galore that would ensue. The declaration of the *Contempt of Court Act* 2016 as unconstitutional did not take away the standing of the ELC as a Court of equal status with the High Court – see Angote J. in *Simandi Investments Limited v Njeru & 2 others; Bwomanwa & another (Intended Contemnors)* (Environment and Land Case Civil Suit 1035 of 2016) [2024] KEELC 1144 (KLR) (29 February 2024) (Ruling):

> " The *Black's Law Dictionary* (Ninth Edition) defines contempt of court as: -
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> "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."
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> 59. Kenyan courts possess the inherent power to enforce compliance with their orders through sanctions. The *Contempt of Court Act* having been declared unconstitutional in *Kenya Human Rights Commission v Attorney General & Another* [2018] eKLR, the instructive provision remains Section 5 (1) of the *Judicature Act*, which grants the High Court (and courts of equal status) and the Court of Appeal the power to punish for contempt."

21. On whether to cite the respondents for contempt, Order 40 Rule 3 of the *Civil Procedure Rules* gives this Court powers to direct as appropriate on disobedience of Court orders. The dispute, as I see here is whether the applicants have proved the elements that can lead to the respondents being cited for contempt. As correctly submitted, for this Court to cite one for contempt as held in *Samuel M. N. Mweru & Others v National Land Commission & 2 Others* [2020] eKLR:

> " It is an established principle of law that[45] in order to succeed in civil contempt proceedings, the applicant has to prove
>
> (i) the terms of the order, (ii) Knowledge of these terms by the Respondent, (iii). Failure by the Respondent to comply with the terms of the order. Upon proof of these requirements, the presence of willfulness and bad faith on the part of the Respondent would normally be inferred, but the Respondent could rebut this inference by contrary proof on a balance of probabilities.[46] Perhaps the most comprehensive of the elements of civil contempt was stated by the learned authors of the book Contempt in Modern New Zealand[47] who succinctly stated:-
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> "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 in civil cases) that: -
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> (a) the terms of the order (or injunction or undertaking) were clear and unambiguous and were binding on the defendant;
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> (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.

41. It is the last test in paragraph (d) above that warrants detailed consideration. Unfortunately, the applicant's counsel never addressed it at all. On the face of our transformative constitution with an expanded Bill of Rights, a pertinent question warrants consideration. Do constitutional values permit a person to be put in prison to enforce compliance with a civil order when the requisites are established only preponderantly, and not conclusively? In my view, a high standard of proof applies whenever committal to prison for contempt is sought because contempt of Court is quasi-criminal in nature.

42. Two principals emerge. The first is liberty: - it is basic to our Constitution that a person should not be deprived of liberty, albeit only to constrain compliance with a court order if reasonable doubt exists about the essentials. In this regard, I am not satisfied that wilful disregard of the court order has been established.

43. The second reason is coherence. It is practically difficult, and may be impossible, to disentangle the reasons why orders for committal for contempt are sought and why they are granted. in the end, whatever the applicant's motive, the court commits a contempt respondent to jail for Rule of Law reasons; and this high public purpose should be pursued only in the absence of reasonable doubt. Accordingly, it is impermissible to find an alleged contemnor guilty of contempt in the absence of conclusive proof of the essential elements. The requisite elements must be established beyond reasonable doubt. In such a prosecution the alleged contemnor is plainly an 'accused person.

44. Third, accidental or unintentional disobedience is not sufficient to justify one for holding guilty of contempt. It is further relevant to bear in mind the settled law on the law of contempt that casual or accidental or unintentional acts of disobedience under the circumstances which negate any suggestion of contumacy, would amount to a contempt in theory only and does not render the contemnor liable to punishment.

45. It should be noted that developing the common law thus does not require the prosecution to lead evidence as to the accused's state of mind or motive: once the three requisites mentioned earlier have been proved, in the absence of evidence raising a reasonable doubt as to whether the accused acted willfully and mala fide, all the requisites of the offence will have been established. And as O'Regan J pointed out, the power to imprison for coercive and non-punitive purposes is 'an extraordinary one': -

'The power to order summary imprisonment of a person in order to coerce that person to comply with a legal obligation is far-reaching. There can be no doubt that indefinite detention for coercive purposes may involve a significant inroad upon personal liberty. Clearly, it will constitute a breach of s 12 of the *constitution* unless both the coercive purposes are valid and the procedures followed are fair. In this case there seems no doubt that the purpose is a legitimate one. It also seems necessary and proper, however, for the exercise of the power to be accompanied by a high standard of procedural fairness.'[48]

> 46. Contempt of court is not merely a mechanism for the enforcement of court orders. The jurisdiction of the superior courts to commit recalcitrant litigants for contempt of court when they fail or refuse to obey court orders has at its heart the very effectiveness and legitimacy of the judicial system. That, in turn, means that the court called upon to commit such a litigant for his or her contempt is not only dealing with the individual interest of the frustrated successful litigant but also, as importantly, acting as guardian of the public interest.[49]

22. The orders issued by this Court are not contested. What is contested is whether there was willful disobedience. Precedents will show that this being quasi-criminal proceedings, the applicant has to prove his case on a beyond reasonable doubt basis. The rationale is that when civil proceedings take a tangent on contempt, the liberty of the person to be cited stands at risk of being taken away. One may land in prison.

23. There is the disputation that it has not been shown at what stage the building was when the orders issued by this Court were served. Who was served, and whether the photographic evidence herein meet the required threshold for admissibility?

24. From the materials I have, I cannot decipher at what point the construction stood when the orders of stoppage were issued. There is also the issue as to which of the Managing Director of the first respondent was served. Mr. Mwambire (the former), who deposed that he was in office when the orders were issued, that upon receipt of the same, construction was stopped. Mr. Shibule (the current) is said to be on compulsory leave; nonetheless, as stated, the status of the construction now and when the orders were issued cannot be ascertained.

25. The photographs produced and attached to the application are not dated, and I see no certificate attached to the same as required under Sections 78 and 106(b) of the *Evidence Act*, rendering the import and intent of the same inadmissible as held in George Gabriel Kiguru & another v Republic [2022] eKLR:

> " The admissibility of electronic records is provided for under Section 106 B of the *Evidence Act* (Cap 80) Laws of Kenya in the following terms:
>
> "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 a 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."
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> 21. Under sub-section (4), where a party seeks to give evidence by virtue of section 106B she has, among other things, to tender a certificate dealing with any matters to which the conditions above relate. The certificate should further:
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> "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."

22. In the case of *Republic v Barisa Wayu Matuguda* [2011] eKLR the court observed that:

"... any information stored in a computer... which is then printed or copied... shall be treated just like documentary evidence and will be admissible as evidence without the production of the original. However, section 106B also provides that such electronic evidence will only be admissible if the conditions laid out in that provision are satisfied."

The court went on to state:

"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."

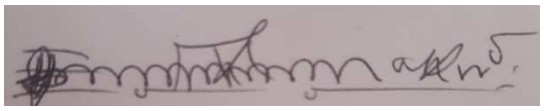
23. In the decision of Benson Mugatsia v Cornel Rasanga Amater, Election Petition 2 of 2012, which relied on the decision of Republic v Berisa Wayu Matuguda Criminal Case No.6 of 2008, the court considered when a certificate will be admissible and it said:

"....any information stored in a computer ...which is then printed or copied.....shall be treated just like documentary evidence and will be admissible as evidence without production of the original: However Section 106B also provides that such electronic evidence will only be admissible if the conditions laid out in that provision are satisfied."

24. It is evidently clear that electronic documents must be accompanied by a certificate in terms of section 106 B (4) of the *Evidence Act* for them to be deemed admissible."

26. Based on what I have on record, the application dated 29 August 2023 is unsustainable and is hereby dismissed with costs.

This ruling is dated, signed, and delivered at Malindi on this 25th day of April 2024 in the absence of parties. Since the Court was not sitting, it will be transmitted electronically, and all parties are to be emailed the same.



E. K. MAKORI

JUDGE