



Kimani Mathu, Atul Shah & Chris Ndegwa (All Jointly Suing as and on Behalf of Kyuna Neighbours Association) & another v National Environment Management Authority & 2 others; Director General, Nairobi Metropolitan Services (Interested Party) (Environment and Land Appeal E075 of 2022) [2024] KEELC 3957 (KLR) (16 May 2024) (Ruling)

Neutral citation: [2024] KEELC 3957 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND APPEAL E075 OF 2022**

OA ANGOTE, J

MAY 16, 2024

BETWEEN

KIMANI MATHU, ATUL SHAH AND CHRIS NDEGWA (ALL JOINTLY SUING AS AND ON BEHALF OF KYUNA NEIGHBOURS ASSOCIATION) 1ST APPELLANT

ISAAC MRUTTU SUING ON BEHALF OF SHANZU ROAD RESIDENTS ASSOCIATION 2ND APPELLANT

AND

THE NATIONAL ENVIRONMENT MANAGEMENT AUTHORITY 1ST RESPONDENT

MAAR PETROLEUM LIMITED 2ND RESPONDENT

THE UNIVERSITY OF NAIROBI 3RD RESPONDENT

AND

DIRECTOR GENERAL, NAIROBI METROPOLITAN SERVICES INTERESTED PARTY

(Being an appeal against the whole of the undated Ruling of the Honourable National Environment Tribunal at Nairobi)

RULING

1. Through a Notice of Motion application dated 22nd November 2023, the 2nd Respondent has sought the following orders:



- a. This court do stay the orders dated 8th November 2023 and all consequent orders arising therefrom pending hearing and determination of the Appeal.
- b. The court do discharge or vary or set aside the said order dated 8th November 2023 and all consequential orders arising therefrom pending hearing and determination of this Appeal.

Alternatively

- c. Spent
 - d. This court do review and/or set aside the said order dated 8th November 2023 and all consequential orders arising therefrom pending hearing and determination of the Appeal.
 - e. That costs of this application be provided for.
2. The application is premised on the grounds that the 2nd Respondent has all the necessary approvals and legal documents to make any construction and to be on site; that the petrol station is up and running and no construction to the petrol station is ongoing at the moment and that the Appellants obtained ex parte orders of contempt of court without serving the Respondents with the contempt of court application even after the court issued the orders for service.
 3. The 2nd Respondent's Director depond that the Appellant's advocates filed an affidavit of service claiming to have served the contempt of court application on the 2nd Respondent yet no service has been made; that the email used is wrongly spelt as adbirazakadvocates@gmail.com instead of Abdirazakadvocates@gmail.com and that the appellants have misinformed the court that construction of the petrol station was still underway, which was not true.
 4. It was averred by the 2nd Respondent that the orders issued on 8th November 2023 shall greatly cause prejudice to the 2nd Respondent's directors as they are being condemned unheard.
 5. The Appellants have opposed the application by way of a Replying Affidavit dated 10th January 2024 and sworn by QS Kimani Mathu, who deponed that the application does not satisfy the tri-threshold imposed for review under Order 45 Civil Procedure Rules as read with Section 80 Civil Procedure Act.
 6. They averred that the Applicants have not lodged a draft reply to the Appellant's determined motion of contempt, to evince any triable defence or response rebutting the existence of an unequivocal order issued on 24th April 2023 restraining any further construction work, their notice or knowledge of the order and their disobedient conduct against the subject order, as established from time-stamped photos.
 7. The Appellants asserted that despite the alleged erroneous service of the application for contempt to an alleged wrongly spelt email address, pursuant to such service, the Applicant's counsel appeared in court; that the Affidavit of Service sworn by Isaya Lemer keto dated 15th May 2023 confirms that he effected service on abdirazakadvocates@gmail.com and that they thereafter served the submissions in support of the application on 17th May 2023 and the finding of contempt in the matter on 2nd November 2023, to the same address.

Submissions

8. Counsel for the 2nd Respondent submitted that the Appellants, despite knowing the 2nd Respondent's advocates' offices and correct email address, deliberately failed to serve the Contempt of Court application on the 2nd Respondent.



9. Counsel submitted that it has satisfied Order 22 Rule 22 and Order 42 of the Civil Procedure Rules and has shown sufficient cause to warrant the grant of stay orders and that the 2nd Respondent's directors shall suffer sufficient harm and prejudice should they be subjected to sentencing arising from the unjust process followed by the Appellants to obtain the orders.
10. It was Counsel's submission that this court should not issue orders in vain and that this case has been overtaken by events. They urged the court to undertake a site visit to ascertain the actual situation on the suit property.
11. Counsel for the Appellants submitted that the Respondents cannot enjoy a right of audience before this court yet they continue to show disregard for its authority and orders and that the contemnors were bound to obey the order including the finding of contempt until the same is set aside.
12. The Appellants' advocate relied on the Court of Appeal case of Shimmers Plaza Limited v National Bank of Kenya Limited [2015] eKLR, Pharmacy and Poisons Board v Siprir Pharmaceuticals Limited & the Republic as quoted in Dorothy K. Kwonyike T/A Luguyan Enterprises v Victoria Commercial Bank Limited [2000] eKLR, DLK v CM [2020] eKLR and Dr. Fred Matiang'i the Cabinet Secretary, Ministry of Interior and Co-ordination of National Government v Miguna Miguna & 4 others [2018] eKLR.
13. Counsel further submitted that while the 2nd Respondent has invoked Order 45 of the Civil Procedure Rules; it has not identified the grounds for review. They urge that there is no new or important evidence which after the exercise of due diligence was not within the contemnor's knowledge or could not be produced and that there is no mistake or error apparent on the face of the record nor is there any other sufficient reason that has been urged.
14. Counsel submitted that the Affidavit of Service sworn by Mr. Isaya Lemerakato dated 15th May 2023 confirms that service was properly effected to the 2nd Respondent through the email of abdirazakadvocates@gmail.com in accordance with Order 5 Rule 22B Civil Procedure Rules 2010 and that a print out of the email was produced in evidence as exhibit marked KM-1.
15. On the 2nd Respondent's claim that the orders of the court are in vain as the project has since been completed, counsel submitted that the actions by the contemnors in defiance of a court order are a nullity and are incapable of protection of the law.
16. Counsel referred to the case of Macfoy v United Africa Co. Ltd [1961] 3 All E.R. 1169 as quoted in Onesmus Sintole Saidimu v Sane Ole Saidimu Nkikoora & 5 Others [2021] eKLR and the Court of Appeal case of Lucy Wangui Gachara v Minudi Okemba Lore [2015] eKLR.

Analysis and Determination

17. Having considered the application, the Appellant's Replying Affidavit and the submissions filed thereto, the issues for the determination by this court are:
 - a. Whether this court should review the orders of this court issued on 8th November 2023.
 - b. Whether this court should stay the orders issued on 8th November 2023.
18. The 2nd Respondent has challenged the ruling of this court delivered on 8th November 2023, which found the 2nd Respondent and its directors, Yusuf Abdi Hussein and Omar Ibrahim Abdi, to be in contempt. The 2nd Respondent has sought to stay the said orders and, in the alternative, they have sought review of the said orders.



19. The 2nd Respondent contends that it obtained all the necessary approvals and legal documents to develop the suit property and to be on site and that the petrol station is up and running and no construction is ongoing at the moment. They argue that the orders of this court have been overtaken by events.
20. Further, the 2nd Respondent has sought orders for review against the ruling of this court on the grounds that they were not duly served with the contempt application. This, they contend, is because the application was served to the wrong email address, adbirazakadvocates@gmail.com rather than abdirazakadvocates@gmail.com.
21. The Appellants have opposed the application on the grounds that the 2nd Respondent does not deserve audience before this court as it continues to disregard the authority and orders of this court. They also argue that it has not identified the grounds for review.
22. In any case, they assert, the application was appropriately served to the proper address of the 2nd Respondent's advocate, as is evidenced from the Affidavit of Service sworn in that respect.
23. The remedy of review is provided in Section 80 of the *Civil Procedure Act* Cap 21, Laws of Kenya as follows:

“Any person who considers himself aggrieved-

- a. by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or
- b. by a decree or order from which no appeal is allowed by this Act, may apply for a review of judgment to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit.”

24. Order 45 Rule 1 of the *Civil Procedure Rules*, similarly provides as follows:

(1) Any person considering himself aggrieved—

- a. by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or
- b. by a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.”

25. From these provisions, the grounds for review which a party must establish are three: (a) discovery of new and important evidence which was not within the knowledge of the applicant or could not be produced at the time the orders were passed; (b) on account of a mistake or error apparent on the face of the record or (c) for any other sufficient reason. This was upheld in *Republic v Public Procurement Administrative Review Board & 2 Others* [2018] eKLR as follows:

“Section 80 gives the power of review and Order 45 sets out the rules. The rules restrict the grounds for review. The rules lay down the jurisdiction and scope of review limiting it to the following grounds; (a) discovery of new and important matter or evidence which after



the exercise of due diligence, was not within the knowledge of the applicant or could not be produced by him at the time when the decree was passed or the order made or; (b) on account of some mistake or error apparent on the face of the record, or (c) for any other sufficient reason and whatever the ground there is a requirement that the application has to be made without unreasonable delay.”

26. The 2nd Respondent has sought the orders for review on the grounds that the application for contempt of court was not served upon them and that the 2nd Respondent was condemned unheard. They have also argued that the contempt application has been overtaken by events as construction of the petrol station has since been completed.
27. It is trite that a review application does not operate as an appeal, and that the focus of a court is not on the merit of the decision, but on how the decision of the court was reached. This was set out by the Supreme Court in *Parliamentary Service Commission v Martin Nyaga Wambora & Others* [2018] eKLR, which sets out the parameters for the discretionary orders of review thus:
- “A review of exercise of discretion is not as a matter of course to be undertaken in all decisions ..., review of exercise of discretion is not a right; but an equitable remedy which calls for a basis to be laid by the Applicant to the satisfaction of the Court; an Application for review of exercise of discretion is not an appeal or a chance for the applicant to re-argue his/her application, in an application for review of exercise of discretion, the applicant has to demonstrate, to the satisfaction of the Court, how the Court erred in the exercise of its discretion or exercised it whimsically. During such review application, in focus is the decision of the Court and not the merit of the substantive motion subject of the decision under review, the Applicant has to satisfactorily demonstrate that the judge(s) misdirected themselves in exercise discretion and as a result a wrong decision was arrived at; or it is manifest from the decision as a whole that the judge has been clearly wrong and as a result, there has been an apparent injustice.”
28. The contempt application was made pursuant to the interim injunctive orders of this court issued on 24th April 2023, where the court directed that the prevailing status quo be maintained, meaning that there should be no further development of the suit property until delivery of the ruling of the court on the Appellants’ injunction application. The injunction application, until now, has not been determined.
29. It is trite that parties and their advocates are bound to obey the orders of the court. If there were circumstances that constrained the 2nd Respondent from complying with this court’s orders, these should have been raised during the hearing of the contempt application.
30. Alternatively, the 2nd Respondent ought to have sought to vary the injunction orders issued by this court of 24th April 2023. Otherwise, the 2nd Respondent was bound to comply with the orders of this court.
31. It is trite that 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 the case of *Teachers Service Commission v Kenya National Union of Teachers & 2 Others* [2013] eKLR:
- “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.”

32. In addition, the issue as to whether or not the application has been overtaken by events by the completion of the petrol station does not fall within the established grounds for review. This information is not new to the 2nd Respondent and by their own admission, was within its Director’s knowledge and could have been produced at the time of hearing of the contempt application. This cannot also be an error on the face of the record because the said information was not availed by the 2nd Respondent during the adjudication of the contempt application.
33. There is then the matter of whether the contempt of court application was served upon the 2nd Respondent. It is their argument that the order was sent to the wrong email of adbirazakadvocate@gmail.com instead of abdirazakadvocate@gmail.com.
34. The Appellants denied this assertion and adduced the Affidavit of Service dated 15th May 2023 sworn by Isaya Lemer keto, against which was annexed a printout of the email that was sent to all the parties containing the contempt application dated 5th May 2023. The email which was sent on 9th May 2023, indicates that it was sent to the right email of abdirazakadvocates@gmail.com.
35. The 2nd Respondent has attached to the Supporting Affidavit sworn by Samuel Nuthu Kega, proceedings which indicate that the 2nd Respondent’s advocate, Mr. Abdirazak was present in court on 24th April 2023 when the court issued orders of status quo. The said advocate was also in court on 18th May 2023, on which date he informed the court he not received the contempt of court application, meaning that he was made aware of the existence of the application but chose to ignore it.
36. That being the case, the Appellants have satisfied this court that the application was properly served upon the 2nd Respondent. There is also no contention that the 2nd Respondent was aware of the existence of the contempt of court application. The failure by the 2nd Respondent to respond to the application was therefore wilful, and not due to the failure of service.
37. The 2nd Respondent has therefore not established any grounds for review of this court’s ruling dated 8th November 2023.
38. The 2nd Respondent has additionally sought that this court stay its orders issued on 8th November 2023. Relying on Order 22 Rule 22 and Order 42 of the *Civil Procedure Rules*, the 2nd Respondent has submitted that it has shown sufficient cause to warrant the grant of stay orders.
39. Order 22 Rule 22 of the *Civil Procedure Rules* provides for stay of execution of decrees, following judgement by a court. Order 22 Rule 22 (1) prescribes that:

“ 1) The court to which a decree has been sent for execution shall, upon sufficient cause being shown, stay the execution of such decree for a reasonable time to enable the judgment-debtor to apply to the court by which the decree was passed, or to any court having appellate jurisdiction in respect of the decree or the execution thereof, for an order to stay the execution, or for any other order relating to the decree or execution which might have been made by the court of first instance, or appellate court if execution has been issued thereby, or if application for execution has been made thereto.”
40. The 2nd Respondent has also sought to rely on Order 42 of the Civil Procedure Rules, which is on appeals. Neither Order 22 Rule 22 nor Order 42 of the *Civil Procedure Rules* are applicable to the circumstances of this case.



41. In any case, an order of stay is a discretionary remedy which this court has the power to grant. *Black's Law Dictionary* (10th Edition) defines judicial discretion as:

“The exercise of judgment by a judge or court based on what is fair under the circumstances and guided by the rules and principles of law; a court’s power to act or not act when a litigant is not entitled to demand the act as a matter of right.”

42. In *Mbogo v Shah* [1968] EA 93, at page 95, as quoted by the Court of Appeal in *Price & another v Hilder* [1984] eKLR, Sir Charles Newbold P stated that in the exercise of the judicial discretion as to whether to set aside a judgment or not, a court must consider the facts, circumstances and the parties merits:

“Whether ... in the light of all the facts and circumstances both prior and subsequent and of the respective merits of the parties, it would be just and reasonable to set aside or vary the judgment, if necessary, upon terms to be imposed...The discretion is intended so to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but is not designed to assist the person who has deliberately sought whether by evasion or otherwise, to obstruct or delay the course of justice.”

43. In this case, this court is not persuaded to exercise its discretion in the 2nd Respondent’s favour, as it has already found the said party to have been guilty of contempt.

44. For those reasons, the application dated 22nd November 2023 by the 2nd Respondent is dismissed with costs.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 16TH DAY OF MAY, 2024.

O. A. ANGOTE

JUDGE

In the presence of;

Mr. Waigwa for Lusi for Appellants

Mr. Abdirazak for 2nd Respondent

No appearance for 1st Respondent

No appearance for 3rd Respondent

Court Assistant - Tracy

