



**Ogando v Kenya Ports Authority Pension Scheme (Defined Benefits) & another
(Environment & Land Case 73 of 2021) [2024] KEELC 4969 (KLR) (24 June 2024) (Ruling)**

Neutral citation: [2024] KEELC 4969 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND CASE 73 OF 2021**

**LL NAIKUNI, J
JUNE 24, 2024**

BETWEEN

JAMES OLUOCH OGANDO PLAINTIFF

AND

**KENYA PORTS AUTHORITY PENSION SCHEME (DEFINED
BENEFITS) 1ST DEFENDANT**

KENYA PORTS AUTHORITY 2ND DEFENDANT

RULING

I. Introduction

1. Before this Honourable Court for its determination is the Notice of Motion application dated 17th August, 2023 by James Oluoch Ogando, the Plaintiff/Applicant respectively. The application was brought under the provision of Order 40 Rule 3 (1), 3(2) and 3(3) of the Civil Procedure Rules, 2010; Section 5 of the *Judicature Act* (Cap. 8), Sections 1B, 3 and 3A of the *Civil Procedure Act* Cap 21 and all other enabling Provisions of the Law.
2. Upon service of the Notice of Motion applications to the Respondents, the 1st Defendant/Respondent opposed the Application through filing of a Replying Affidavit dated 30th October, 2023.

II. The Plaintiff/ Applicant's case

3. The Plaintiff/Applicant sought for the following orders:-
 - a. Spent
 - b. That this Honourable Court make a finding that the following trustees of the 1st Defendants are in contempt of its Orders made on 8th March 2022 and issued on 9th March 2022.



- i. Mr. Yobesh Oyaro
- ii. Mr. Alex Ole Leteipan
- iii. Mr. Daniel Ogutu
- iv. Mr. Salim Chingabwi
- v. Mr. David Bonyi
- vi. Mr. Ferdinard K. Malumbo
- vii. Mrs. Violet M.O. Mugambi
- viii. Mr. Paul Muthwii Mwaka
- ix. Mr. Conrad Thorpe

- a. That having made a finding that the trustees named at Sub - Paragraphs 2.1 to 2.9 above have breached the Order of the Court, this Honourable Court be pleased to Summon the same trustees to appear before it in person and physically to Show Cause why they should not be detained in prison for breaching its Orders mentioned in paragraph 2 Supra.
- b. That since the trustees listed above have treated the Court Order as a mere cosmetic exercise, this Honourable Court take measures as will ensure that no further sale, waste, alienation / transfer of Suit Properties are occasioned by issuing Order compelling the 2nd Defendant (who is the Sponsor/ Creator of the Pension Scheme) to nullify the nomination / election of the said trustees as members of the Board of Trustees of the Pension Scheme until this Application is heard and determined.
- c. That the cost of this Application be borne by the 1st Defendant

4. The application by the Plaintiffs/Applicants is premised on the grounds, facts and testimony on the face of the application and further supported by the annexed affidavit of JAMES OLUOCH OGANDO, the Applicant herein. The Applicant averred that:-

- a. This Honourable Court made a status quo Order on 8th March 2022 restraining the 1st Defendant from selling, wasting, alienating/transferring the Suit Properties, pending the hearing and determination of his Application dated 21st February 2022 and filed in Court the same day.
- b. The Court Order was served on the 1st Defendant on 10th March, 2022.
- c. The 1st Defendant filed their Application dated 17th March 2022 asking the Court to set aside its Order of 8th March 2022 for the reasons stated on the face of the Application.
- d. The Court declined to set aside the Order as prayed, and eventually dismissed the application in its entirety as it lacked merit.
- e. There was evidence, as exhibited in Paragraph 7 of his Supporting Affidavit herein, that trustees of the 1st Defendant named in Paragraph 2 Supra, had willfully and deliberately disobeyed the Order of the Court by doing what the Court had restrained them from doing, namely selling, wasting, alienating and or transferring the Suit Properties.



- f. Some of the instances where the breach of the Court order had been occasioned were as follows:-
- i. On 23rd May, 2022 the 1st Defendant entered into a Sale Agreement with one of the bidders for Sale of Suit Property land reference No. 10530/59 in Nairobi. This was 76 days after the Court Order issued on 9th March, 2022 had been issued. For details and evidence see paragraph 7(a) in his Supporting Affidavit annexed to this Application.
 - ii. Wasting. After floating the tender for Sale of the Suit Properties, the 1st Defendant evicted the tenant on Suit property land reference No. LR MN/1/1660 sitting on 1 (one) acre Plot along Links Road in Nyali, Mombasa, to pave way for sale. No security arrangements were made to secure the property and as a result the property has been vandalized as detailed in paragraph 7(b) of the Supporting Affidavit herein. Soon this property will remain a shell of once a valuable rental building and only land will be left to be sold. At paragraph 7(b) of the Affidavit was a set of photographs showing the wastage of the same property.
 - iii. Alienation/Transfer. The floated tender for Sale of Suit Property Land Reference No. MN/1/1286 sitting on 1 (one) acre plot along Links Road Nyali, Mombasa Mainland, was indicated in the advertised tender to be in vacant possession. When the bidders were taken to view the said property, this was found not to be the case. The property was not vacant and appeared to be a fully-fledged functioning Private School. Please see a set of photos of the property in paragraph 7(c) of the accompanying Supporting Affidavit.
 - iv. This was a clear evidence that the floated tender was not transparent and did not mean well for members of the Pension Scheme. It looked like the said Suit property might have been sold earlier under unclear circumstances and the floated tender was just a cover-up.
- g. In paragraph 110 of his application dated 21st February, 2022, he briefly touched on how the floated tender was fraught with illegality, lack of transparency as [Land Registration Act](#) (No.3) of 2012, [Retirement Benefits Act](#) and Procurement and Assets Disposal Act and Regulations were not followed. Violation of the last mentioned Act was in essence violation of the Kenya Constitution as, under Article 227 (1) the statute states as follows: “When a State Organ or any other public entity contracts for goods or services, it shall do so in accordance with a system that is fair, equitable, transparent, competitive and cost-effective”.
- h. This Honourable Court should view breach of its Orders against the backdrop of the above violations.
- i. As an 80 year old man, the Applicant was in court despite his advanced age to get justice. Contempt of the Order of this Court had put him in a position of fear, hopelessness, anxiety as to the authority and dignity of our Courts and abuse of his Constitutional rights as the property which belonged to him and 5000 other Senior Citizens who, over the years suffered deductions from their salaries during their working years, which money was invested in acquisition of the Suit Properties which were being sold without their consent.
- j. His confidence could only be restored if after due diligence, this Court could stamp its authority on those who had breached its clear and express Orders so as to warn those who might be tempted to breach future Orders of the Court.



- k. It was his conviction that the trustees involved, all of them were holders of Masters degrees and even PhD degrees, had willfully and deliberately disobeyed the legitimate and lawful Orders of this Honourable Court. Among them was a Lawyer who was currently an Advocate of the High Court of Kenya (actually official of the Court) and a Senior Partner in a respected Firm of Advocates, who should have known better and guided on the dignity of their Courts and dangers of breaching Court Orders.
- l. The removal of these trustees from the Board of Trustees of the Scheme would not disrupt the normal operations of the Scheme in any way. Since they had willfully and deliberately breached the Court Order the only tenable way of stopping them from causing further havoc to the Scheme properties was to remove them as prayed for in this Application.

III. The Response by the 1st Defendant/ Respondent

5. The 1st Defendant/ Respondent opposed the Notice of Motion application by the Plaintiff through a Replying affidavit sworn on 30th October, 2023 on the following grounds:-
 - a. The Status Quo Order issued by this Honourable Court on 8th March 2022 needed to be extended from time to time.
 - b. That this Honourable Court on 5th April 2022 "expressly" refused to extend the Status Quo Order above.
 - c. Because of this "express" refusal there was no Order in place capable of being breached.
 - d. The Court eventually dismissed the 1st Defendants Application dated 17th March 2022 and issued a "fresh injunction".

IV. Submissions

6. On 30th October, 2023 while the Parties were present in Court, they were directed to have the Notice of Motion application dated 17th August, 2023 be disposed of by way of written submissions. By the time of penning down this Ruling, the Honourable Court could only assess the submissions by the Plaintiff/Applicant. Pursuant to that the Honourable Court reserved 20th February, 2024 for delivering of the ruling. However, due to unavoidable circumstance the Ruling was eventually delivered on 20th June, 2024 by Court accordingly.

A. The written submission by the Plaintiff/ Applicant

7. The Plaintiff/Applicant acting in person filed his written submissions dated 16th February, 2024. Mr. Oluoch Ogendo commenced his submissions by stating that committal applications for Contempt of Court Orders must comply with the Provisions of the Written Law in Kenya as well the relevant Law as currently operates in England. Kenya Courts are expected to know the prevailing rules in England. In Kenya the Law for breach of Court Order is under Order 40 Rule 3 (3) which reads:-

"An Application under this rule shall be made by Notice of Motion in the same Suit".

8. According to the Plaintiff in England the Law is Civil Procedure (Amendment No. 2) Rules, 2012 which states that Notice for Committal must be lodged in the Court that issued the Order. This was clearly explained in the list of authorities annexed (No. 1), namely "Republic – Versus - County Executive Committee Finance and Economic Planning Mr. Allan Mugambi 3. 20 Others; Line Enterprises Limited (Ex - parte) (Miscellaneous Application E041 of 2021) [2022] KEHC 3016 (KLR)



(Judicial Review) (3rd February 2022) Ruling Neutral Citation: [2022]KEHCC.....3016 (KLR)” where the Court stated under paragraph 14 that:-

“ Thus the Application for Contempt cannot be made in Proceedings separate from those in which the judgement or Order alleged to have been breached was made.”

The Applicant herein had complied with these Legal Provisions.

9. The Plaintiff went further to state that from the above explanation, he submitted that his Notice of Motion application dated 17th August, 2023 was properly before the Honourable Court.
10. On the 1st Defendant’s case, the Plaintiff submitted that from their Replying Affidavit dated 30th October, 2023 it was the 1st Defendants position that:-
 - a. The Status Quo Order issued by this Honourable Court on 8th March 2022 needed to be extended from time to time.
 - b. That this Honourable Court on 5th April 2022 “expressly” refused to extend the Status Quo Order above.
 - c. Because of this “express” refusal there was no Order in place capable of being breached.
 - d. The Court eventually dismissed the 1st Defendants Application dated 17th March 2022 and issued a “fresh injunction”.
11. On the Plaintiff’s case, he argued that after carefully reading the Order of this Honourable Court made on 5th April 2022 and issued on 11th April 2022, it was his position that the Court:
 - a. Allowed the adjournment of the case and directed the hearing of his Notice of Motion Application dated 21st February, 2022 be canvassed by way of Written Submissions by parties.
 - b. The parties complied with the Order. No hearing therefore took place on 5th April, 2022. The Applicant was admitted at Premier Hospital, Mombasa. The Court had been notified earlier. Evidence in the form of medical reports are available in Court records.
 - c. On the same day that the Court Order was issued, i.e. 5th April, 2022 the Defendants breached the Status Quo Order of 8th March, 2022 by accepting offers from bidders, thus allowing third party interests and share in the Suit Properties. This will be explained later. It worth noting that the 1st Defendant filed their Submission on 4th April 2022 before the Court had given leave for same.
 - d. The breach of the said Order was deliberate and willful because of (c) above.
 - e. The 1st Defendants should be condemned with the cost of the Plaintiff /Applicant’s Application dated 17th August 2023.
12. On the issues for determination, the Plaintiff relied on the following:-
 - i. Whether this Honourable Court through its Order of 5th April 2022 set aside its earlier Status Quo Order of 8th March 2022.
 - ii. Whether the 1st Defendant breached the Status Quo Order issued by this Honourable Court on 8th March 2022.
 - iii. What reliefs were available to the Plaintiff/ Applicant



- iv. Cost of his Application dated 17th August 2023
13. On whether the orders of 8th March, 2022 were set aside by the order made on 5th April, 2022. The Plaintiff referred the Court to paragraphs 9 and 10 in the Replying Affidavit of the 1st Defendant dated 30th October 2023 where they claimed that the Status Quo order made on 8th March 2022 needed to be extended from time to time. The 1st Defendant had not explained the basis on which they have made this opinion. No reference at all to known Law or Authority.
14. The Plaintiff argued that that this was not the position of the Law. Status Quo Orders were issued with specific purpose of preserving the subject matter until the Application for which it was issued was heard and determined. It was not an Order which can be issued today, set aside next week and reinstated the week following that as the 1st Defendants claim. That would be an absurdity. In the case of:- “Fatuma Abdi Jillo v Kuro Longesen & Another [2021] eKLR”. Pages 4-6 the Court said: “in essence therefore, a Status Quo Order is meant to preserve the subject matter as it is/existed as at the day of making the Order.....Pending the determination of the issue in contention”.
15. Again in the case of:- “Mburu v Kibara & 20 Others (Environment and Land Case 237 of 2021) [2022]KEELC3226(KLR) (28th July 2022)”, a case which was before his this Honourable Court, the Court reiterated the definition of Status Quo Order, its purpose and application. In paragraph 25, the Black Law Dictionary defines Status Quo as a Latin word which means “the situation as it exists”. By maintaining Status Quo, the Court strives to safeguard the situation..... “thereby rendering nugatory its proposed decision”.
16. The Defendants also, without any proof claimed that since the Status Quo Order needed to be extended from time to time, this Honourable Court refused to extend it and the Order was impliedly set aside by the Order made on 5th April 2022. Court Orders are never implied; they must be formally issued in clear terms. There was no evidence that this Court on 5th April 2022 formally set aside the Status Quo Order in question. What the Court ordered stated, parties canvas his Application dated 21st February 2022 by way of Written Submissions.
17. According to the Plaintiff extension of court orders was very well covered in “Maxam Limited & 2 Others v Heineken East Africa Import Co. Ltd & 2 others [2017] eKLR”. Relying on Order 40 Rule 6 of the Civil Procedure Rules (2010) the Court in Paragraphs 16 and 17 stated:-
- “An Application for the extension of Interim Orders post the prescribed period or post the twelve month period under Order 40 Rule 6 of the Civil Procedure Rules is a purely discretionary matter. The discretion is however to be judiciously exercised. Where, however the Court has expressly stated that the Interlocutory Injunction is to last until the hearing and determination of the Suit, then I see no reason why it should be argued that the Order will lapse at the end of 12 months. This clearly should mean that where the Court does not state how long the Order is to last then at the expiry of twelve months any affected party may move the Court to have the Order vacated..... An argument that an interlocutory injunction lapses automatically may thus be without logic both in Law and Equity”.
18. According to the Plaintiff, from the above, it should have been clear that the Status Quo Order still had one year to be in force from 5th April 2022. The Plaintiff went further submitted that the allegation of the 1st Defendant that in paragraph 9 of their Replying Affidavit dated 30th October 2022 that this Honourable Court expressly refused to extend the Status Quo Order was not correct. There was no application before the Court on the day requesting for Extension of the Order, neither did the 1st



Defendant move the Court on the same. There was therefore nothing before the Court capable of being refused as regards Extension of the Order which had still almost a year to run.

19. On whether, the 1st Defendant breached the status quo order issued by this Honourable Court on 8th March, 2022. The Plaintiff stated the Applicant herein was aware that in Committal Applications, the Applicant must prove his case beyond balance of probability though not beyond reasonable doubt. In the instant case, the proof was beyond reasonable doubt as will be shown shortly.
20. There were certain ingredients that the Applicant must demonstrate to convince the Court that there are merits in the Application. On this point, the Plaintiff referred the Court to the case of “Vitalls Otiego Odida v Martin Chengo [2022] eKLR” (annexed as authority) where these ingredients are quoted in paragraph 22 where Justice Mativo said:

“In order to succeed in contempt proceedings, the Applicant has to prove the following:

- a) That the terms of the Order were clear and unambiguous and binding to the Defendant.
- b) That the Defendant had knowledge of proper notice of the terms of the Order.
- c) That the Defendant has acted in breach of the terms of the Order.
- d) That the conduct of the Defendant is deliberate.

The Court went on under the same paragraph and quoted the observations of the Court of Appeal thus:

“it is trite that to commit a person for contempt of Court firstly, the Court must be satisfied that the person has deliberately and willfully disobeyed a Court Order that he was aware of.

Secondly.....”

21. The Plaintiff submitted that the Status Quo Order of 8th March 2022 was expressed in clear terms and had no ambiguity whatsoever. The order made it clear to the 1st Defendants that they could not sell, waste, transfer and or alienate the Suit Property. The 1st Defendant had not raised any issues to suggest that there was any ambiguity in the Order.
22. Further the Plaintiff averred that the 1st Defendant had knowledge of the Motion, and Supporting Affidavit, which sought for the said Order to be set aside by this Honourable Court. At this juncture the Plaintiff urged the Court to find time to peruse the Notice of 17th March 2022 which are in Court records. The Deponent of the Supporting Affidavit, one Paul Mwake, one of the Contemnors and a Trustee authorized by other trustees to handle issues like this, where he said this in paragraph 2 of the Affidavit:

“I am aware that this Honourable Court on 8th March 2022 issues an Order stopping the 1st Defendant from selling, alienating, wasting or transferring the Suit Property (I annex and mark as PM - 1 a copy of the Order issued on 8th March 2022)”

23. On whether the actions of the 1st Defendant were deliberate and willful and meant to undermine the dignity of this Honourable Court. The Plaintiff submitted that the Court needed to look at the point in time when the breach of the Order initially occurred. It was at this time that the complexion of the Status Quo Order changed as third party interests in the Suit Property was allowed by the 1st Defendant. On 5th April, 2022, the Court sat to hear the 1st Defendant Application dated 17th March



2022 seeking setting aside of the Status Quo Order issued by this same Court on 8th March 2022. On the same day, apparently before the Court had welcomed the litigants, the 1st Defendant accepted offers from bidders of Suit Properties. Ownership of the said properties was now shared by bidders and members of the Pension Scheme could no longer enjoy absolute ownership of their property. The purpose of the Status Quo Order, namely preserving the properties, was defeated at that date. The bidders now had the right to place Caveat on the properties.

24. The Plaintiff urged the Court to look at evidence of this on Supporting Affidavit of Paul Mwaka, a Contemnor, dated 14th June 2022, which was annexed to 1st Defendants second Submission of the same date. They were in Court records. Further, the Plaintiff averred that the contractual relationship between the Defendants and the bidders of the suit properties became legally binding on this 5th April, 2022. It was trite in Law of Contracts that the three elements offer, acceptance, valuable consideration were necessary to constitute legally actionable contractual obligations. In the instant case, the offer was in the bid document; valuable consideration is the bid amount and acceptance was the award letters from the 1st Defendant. The 1st Defendant did all this while aware of the existence of a Status Quo Order (Not an ex-parte Order), whose terms were unambiguous and had been in place for only 23 days. By their actions above the 1st Defendant indeed acted willfully and deliberately in breaching the Order of this Court.
25. In paragraph 8 of their Replying Affidavit dated 30th October, 2023, the 1st Defendants have confirmed that they indeed sold, transferred, and alienated the Suit Properties and thus rendered valueless the Status Quo Order whose purpose was to preserve the Suit Properties.
26. This indeed was the proof beyond any reasonable doubt that he had referred to earlier. See also “MMN v JMM [2022] eKLR” on willful contempt where false reasons were given to breach Court Order.
27. The Plaintiff submitted that contempt of Court Order eroded the dignity of our Courts and make the Court users to lose confidence in the Courts they go to in order to get justice over their grievances. This view had been expressed years and years by our Courts. Proven Contempt must therefore be punished. He referred to the case of “Sheila Cassat Isenberg & Another v Antony Machatha Kinyanjui [2021] eKLR”, the Court at paragraph 49 stated: “Ibrahim J (as he then was), underscored the importance of obeying Court Orders, stating:

“It is essential for the maintenance of the rule of Law and Order that the authority and dignity of our Courts are upheld at all times. The Court will not condone deliberate disobedience of its Orders and will not shy away from its responsibilities to deal firmly with proved Contemnors. It is the plain and unqualified obligation of every person against whom an Order is made by Court of Competent Jurisdiction, to obey it unless and until the 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 the Order believes it to be irregular or Void.

28. Under the provision of Order 40 Rule 3 (1) of Civil Procedure Rules, 2010 and Section 5 of the *Judicature Act* (Cap. 8) and Section 3A *Civil Procedure Act* Cap. 21 give this Honourable Court unlimited power to punish Contemnors for their actions. The Plaintiff further stated that the claim by the 2nd Defendant that this Court cannot punish the Contemnors in any way is misplaced. Internal rules of the Pension Scheme, which do not deal with Contempt issues are severely inferior to powers of this Court. The claim was in paragraphs 5 and 6 of their Replying Affidavit dated 27th October, 2023. The names of the Contemnors are listed in paragraph 2 of his Application dated 17th August 2023. This had been confirmed by the two Defendants. Annexed to the list of Authorities was



an extract from the Annual Report of the Pension Scheme for the year ended December 2022. See page 1 thereof which re - affirmed the names of the contemnors.

29. In conclusion, the Plaintiff stated that he believed his submission, supported with evidence where necessary, was merited. For that reason, he requested this Honourable Court to grant the prayers sought in his notice of motion application dated 17th August, 2023 and the costs of the same to be awarded to the Plaintiff.

V. Analysis and Determination

30. I have carefully read and considered the pleadings herein the Notice of Motion application dated 17th August, 2023 by the Plaintiff/Applicant and the brief replies by the 1st Defendant/Respondent herein, the written submissions and the cited authorities by the Plaintiff/Applicant, the relevant *Constitution of Kenya, 2010* and statutes.
31. In order to reach an informed, fair and reasonable decision, the Honourable Court has condensed the subject matter into the following two (2) issues for its determination. These are: -
- a. Whether the duly appointed Trustees of the 1st Defendant/Applicant should be summoned by this court to attend and show cause why they should not be punished; and
 - b. Whether, if the order issues, the said Trustees of the 1st Defendant should be arrested to compel their attendance.?
 - c. Who bears the costs of the Notice of Motion application dated 17th August, 2023.

IssueNo. a). Whether the duly elected Trustees of the 1st Defendant was in contempt of this Honourable Court made on 8th March, 2022 and issued on 9th March, 2022?

32. The Honourable Court has deciphered that the main Substratum in this proceedings herein is one on Contempt of Court from an alleged breach and gross violation of the Court orders. It has been stated on umpteenth times that Court orders are sacrosanct. They are not a formality nor cosmetic. They have to be obeyed however erroneous they maybe. The only remedy available is for an aggrieved party to revert back to Court seeking for either review or variation or setting aside or discharge of the said orders depending on the prevailing circumstance and surrounding facts and inferences. The consequences of disobedience of Court order is extremely serious as it borders on criminality capable of one forfeiting their fundamental rights and freedoms enshrined in the Bill of Rights under *the Constitution*.
33. The application has been brought under the provision of Sections 5 and 29 of the *Judicature Act*, Cap. 8. The application before me was filed in the year 2020. From the notes appearing on the Act it is apparent that that Section was repealed in the year 2016 vide Act No. 46 of 2016, Sections. 38. Section 29 of the *Environment and Land Court Act* provides as follows:

“

“29. Offences

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.”



34. Order 40 Rule 3 of the Civil Procedure Rules, 2010 on the consequence of breach of injunctive orders provides as follows:-

- “(1) In cases of disobedience, or of breach of any such terms, the court granting an injunction may order the property of the person guilty of such disobedience or breach to be attached, and may also order such person to be detained in prison for a term not exceeding six months unless in the meantime the court directs his release.
- (2) No attachment under this rule shall remain in force for more than one year, at the end of which time, if the disobedience or breach continues, the property attached may be sold, and out of the proceeds the court may award such compensation as it thinks fit, and shall pay the balance, if any, to the party entitled thereto.
- (3) An application under this rule shall be made by notice of motion in the same suit.

35. I wish to refer to the Black’s Law Dictionary 11th Edition, which defines contempt as:-

“The act or state of despising; the quality, state or condition of being despised. Conduct that defies the authority or dignity of a court or legislature. Because such conduct interferes with the administration of justice, it punishable by fine or imprisonment”.

36. At some initial point, the legal framework that governed contempt of court was the [*Contempt of Court Act*](#) until it’s nullification in the case of:- “Kenya [*Human Rights Commission v Attorney General & another \[2018\] eKLR Constitutional Petition No. 87 of 2017*](#)”.

37. However, the court in the case of:- “Samuel M. N. Mweru & Others v National Land Commission & 2 others [2020] eKLR” while discussing the legal framework on contempt of court stated as follows:-

“The applicable law as regards contempt of court existing before the enactment of the [*Contempt of Court Act*](#) was restated by the Court of Appeal in Christine Wangari Gachege v Elizabeth Wanjiru Evans & 11 Others, [2014] eKLR. In that case the Court found that the English law on committal for contempt of court under Rule 81.4 of the English Civil Procedure Rules, which deals with breach of Judgment, order or undertakings, was applied by virtue of Section 5 (1) of the [*Judicature Act*](#) which provided that:

“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.”

This section was repealed by Section 38 of the [*Contempt of Court Act*](#) of 2016, and as the said Act has since been declared invalid, the consequential effect in law is that it had no legal effect on, and therefore did not repeal Section 5 of the [*Judicature Act*](#), which therefore continues to apply. In addition, the substance of the common law is still applicable under Section 3 of the [*Judicature Act*](#). This Court is in this regard guided by the applicable English Law which is Part 81 of the English Civil Procedure Rules of 1998 as variously amended, and the requirement for personal service of court orders in contempt of Court proceedings is found in Rule 81.8 of the English Civil Procedure Rules.”



38. As restated in the above case law, the law then applicable in contempt of court proceedings is Section 5(1) of the Judicature Act which mandates that the court relies on the applicable law in England at the time the alleged contempt is committed. In the case of “Samuel M. N. Mweru (Supra) the Court dealing with an application for contempt of court based on disobeyed of a court order stated:

“ An application under Rule 81.4 “(breach of judgement, order or undertaking) now referred to as “application notice” (as opposed to a notice of motion) is the relevant one for making the application now under consideration. The application notice must set out fully the grounds on which the committal application is made and must identify separately and numerically, each alleged act of contempt and be supported by affidavit(s) containing all the evidence relied upon”.

39. I reiterate that a claim on contempt of court is a grave issue that the court treats with a lot of seriousness as it goes to the core of undermining the authority of the court. It is a fundamental principle of law that court orders are meant to be obeyed to the letter as they are not issued in vain. Failure to obey court orders would then result in contempt of court.

40. The importance of obedience of court orders was restated in the case of “Econet Wireless Kenya Limited v Minister for Information & Communication of Kenya & another [2005] eKLR” where the court cited with approval the case of “Gulabchand Popatlal Shah & Another Civil Application No. 39 of 1990”, (unreported). The Court of Appeal held, inter alia,

“ It is essential for the maintenance of the Rule of Law and good order that the authority and dignity of our courts are upheld at all times. This court will not condone deliberate disobedience of its orders and will not shy away from its responsibility to deal firmly with proved contemnors

41. Fundamentally, courts need to ascertain whether the applicant herein has met the basic elements set out to prove a case for contempt of court. In the case of “Katsuri Limited – v Kapurchand Deepar Shah [2016] eKLR” as relied upon by the Respondents, the court stated that:

“ The applicant must prove to the required standard (in civil contempt cases which is higher than in criminal 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.”

42. I will therefore be analyzing each element as set out above and in close application to the instant case. In so doing I will be looking at the court order issued by the court. The provision of Section 29 of the Environment and Land Court is clear to the effect that:-

“ 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



43. It is an established principle of law as was held in the case of “Kristen Carla Burchell v Barry Grant Burchell, Eastern Cape Division Case No. 364 of 2005” in order to succeed in civil contempt proceedings, an Applicant has to prove (i) the terms of the order, (ii) Knowledge of these terms by the Respondents, (iii). Failure by the Respondent to comply with the terms of the order.
44. Now applying these principles to the instant application. From the sworn affidavits, annexure’s, submissions by the respective parties’ Counsels on record, the applicable law and the decided cases, the following issues stand out for determination:-
- i. Whether there was a valid Court order made on 8th March, 2023 and issued on 9th March, 2023 by this Honourable Court
 - ii. Whether the Defendants/ Respondents herein were served with or was aware of the orders made on 8th March, 2023.
 - iii. Whether the order as sought and extracted was clear and unambiguous
 - iv. Whether the Defendants/ Respondents are guilty of contempt of Court order herein issued.
45. With all due respect and without mincing words, the Honourable court outrightly states that it is not at all persuaded that there is any Contempt of Court committed by the Defendants as alleged by the Plaintiff for the following reasons:- Firstly, I hold that it is clear that the order issued by the court was clear and unambiguous. It was addressed to the both Parties, hence binding upon them. The core ground is that this Honorable Court made the orders on 8th March, 2023 and they were issued Orders on 9th March, 2023 as follows:-
- a.
 - b. That the Status Quo be maintained before the inter parte hearing meaning no sale, waste, alienation and/or transfer of the suit property to take place.
 - c.
46. These orders through were overtaken by events when the Notice of Motion application dated 21st February, 2022 was heard and determined and the Honourable Court delivered a judgment allowing the application which sought for:-
- Pending the hearing and determination of this suit, a temporary injunction be issued by this Honourable Court restraining the 1st Defendant, their servants and or agents from processing the said tender namely TENDER NO.KPAPS/DISP/003/2022 OF 2022"
47. According to the Plaintiff, there was evidence, as exhibited in paragraph 7 of his Supporting Affidavit herein, that trustees of the 1st Defendant named in paragraph 2 Supra, have willfully and deliberately disobeyed the Order of the Court by doing what the Court had restrained them from doing, namely selling, wasting, alienating and or transferring the Suit Properties. Some of the instances where the breach of the Court order had been occasioned were as follows:-
- a. On 23rd May, 2022 the 1st Defendant entered into a Sale Agreement with one of the bidders for Sale of Suit Property land reference No. 10530/59 in Nairobi. This is 76 days after the Court Order issued on 9th March, 2022 had been issued. For details and evidence see paragraph 7(a) in his Supporting Affidavit annexed to this Application.



- b. Wasting. After floating the tender for Sale of the Suit Properties, the 1st Defendant evicted the tenant on Suit property land reference No. LR MN/1/1660 sitting on 1 (one) acre Plot along Links Road in Nyali, Mombasa, to pave way for sale. No security arrangements were made to secure the property and as a result the property has been vandalized as detailed in paragraph 7(b) of the Supporting Affidavit herein. Soon this property will remain a shell of once a valuable rental building and only land will be left to be sold. At paragraph 7(b) of the Affidavit was a set of photographs showing the wastage of the same property.
 - c. Alienation / Transfer. The floated tender for Sale of Suit Property Land Reference No. MN/1/1286 sitting on 1 (one) acre plot along Links Road Nyali, Mombasa Mainland, was indicated in the advertised tender to be in vacant possession. When the bidders were taken to view the said property, this was found not to be the case. The property was not vacant and appeared to be a fully-fledged functioning Private School. Please see a set of photos of the property in paragraph 7(c) of the accompanying Supporting Affidavit.
48. The Court takes note that this was before it rendered its ruling on 29th May, 2023 which therefore begs the questions; why did the Plaintiff wait for this long to filed for contempt of court orders.
 49. Secondly, on the alleged contemnor ought to have knowledge of or proper notice of the terms of the order. According to the Plaintiff, the Defendants were well aware of the Orders of the Court but chose to blatantly disobey the said Orders by unlawfully and illegally making an attempt to take occupation of the Suit Property. The Plaintiff's application dated 17th August, 2023 was filed to ensure that the rule of law is preserved and that the Defendants are held accountable for failure to comply with the Orders of the Court made on 8th March, 2022 and issued on 9th March 2022..
 50. Thirdly, the allegations blatantly meted out by the Applicant to the effect that the Respondent had willfully disobeyed these orders and on or around 23rd May, 2022, the 1st Defendant entered into a Sale Agreement with one of the bidders for Sale of Suit Property land reference No. 10530/59 in Nairobi. This is 76 days after the Court Order issued on 9th March, 2022 had been issued. For details and evidence see paragraph 7 (a) in his Supporting Affidavit annexed to the Application.
 51. Further, that accusation that the Defendants willfully acted in contempt by not obeying this Court orders as this Honorable Court had made clear orders in terms of handling of the suit property remain as mere unproved assertions. Additionally, the Honourable Court fully concurs with the aversions made by the 1st Defendant that the Plaintiff/Applicant herein has failed to adduce any evidence to prove the alleged contravention of the said Court Order.
 52. Fourthly, the Court fully concurs with the aversions rightfully made out on the proper legal position by the 1st Defendant/ Respondent to wit that:-
 - a. The service of the orders to the 1st Defendant/ Respondent was not disputed.
 - b. The 1st Defendant/Respondent in contravention of said Orders entered into a Sale Agreement with one of the bidders for Sale of Suit Property land reference No. 10530/59 in Nairobi. This is 76 days after the Court Order issued on 9th March, 2022 had been issued. For details and evidence see paragraph 7 (a) in his Supporting Affidavit annexed to this Application. The 1st Defendant went ahead to evict a tenant on Suit property land reference No. LR MN/1/1660 sitting on 1 (one) acre Plot along Links Road in Nyali, Mombasa, to pave way for sale. No security arrangements were made to secure the property and as a result the property has been vandalized as detailed in paragraph 7(b) of the Supporting Affidavit herein. Soon this property will remain a shell of once a valuable rental building and only land will be left to be



sold. At paragraph 7(b) of the Affidavit was a set of photographs showing the wastage of the same property.

- c. The application was therefore not clear and it does not show how the 1st Defendant/ Respondent have interfered with the orders of this Honourable Court.
 - d. The Plaintiff has failed to demonstrate how the 1st Defendant was in contempt of Order 40 Rule 3 of the Civil Procedure Rules 2010 as indicated in the application.
53. To this end, therefore, the Honourable Court is not satisfied that the Applicant has proved its case for contempt of Court orders by this Honourable Court given on 5th March, 2022 against the 1st Defendant/ Respondent. This court is unable to find any merit in the instant application. The court's jurisdiction to punish parties for their disobedience of court orders exists in the [Environment and Land Court Act](#) provisions cited by the applicant as well as under common law. The court also has jurisdiction to bring a long drawn out litigation to an expedited end in accordance with the overriding objective of Sections 1A, 1B and 3A of the [Civil Procedure Act](#) provisions cited by the applicant. However any punitive action against a party for disobedience must be taken only in the clearest of cases especially due to the fact that the process of punishment for contempt of court orders is quasi-criminal in nature may include loss of a subject's liberty.
54. The Court of Appeal in "Woburn Estate Limited v Margaret Bashforth [2016] eKLR " emphasized that:-
- "We reiterate that contempt proceedings being of quasi - criminal in nature and since a person may lose his right to liberty, each stage and step of the procedure must be scrupulously followed and observed. We bear in mind the often-cited passage attributed to Lord Denning In Re Bramblevale Ltd [1970] 1 CH 128 at page 137 that;
- "A contempt of court is an offence of criminal character. A man may be sent to prison for it. It must be satisfactorily proved showing that when the man was asked about it, he told lies. There must be some further evidence to incriminate him."
- In the result we find that the learned judge erred in the decision he reached holding the appellant liable in contempt and the punishment he imposed."
55. As stated above, contempt proceedings are of a criminal nature and involve, if proved, loss of liberty. The Applicant must therefore endeavor to prove all facts relied on by way of evidence beyond reasonable doubt. In the instant application this Court is being asked to summon the trustees of the 1st Defendant to show cause why they should not be punished. As I have noted there must be a prima facie case of contempt of court set out against them, which has not been sufficiently rebutted, and orders must have already issued convicting them of contempt before this court can summon them and in this case contempt has not been proved.
56. In the end, it is the finding of this Honourable Court that the Applicant has not proved to the required standard that the 1st Defendant/ Respondent as cited were in brazen disobedience of the Court orders issued by this Honourable Court on 8th March, 2022. Therefore, all the prayers of the application must fail.



IssueNo. b: Who bears the costs of the Notice of Motion application dated 17th August, 2023

57. It is now well established that the issue of Costs is at the discretion of the Court. Costs mean the award a party is granted at the conclusion of a legal action or proceedings in any litigation. The Black Law Dictionary defines cost to means:-

“the expenses of litigation, prosecution or other legal transaction especially those allowed in favour of one party against the other”

58. The provision of Section 27 (1) of the [Civil Procedure Act](#), Cap. 21 holds that costs follow the events. It provides as follows:-

“(1) Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or Judge, and the court or Judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid; and the fact that the court or Judge has no jurisdiction to try the suit shall be no bar to the exercise of those powers: Provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or Judge shall for good reason otherwise order.”

59. A careful reading of Section 27 indicates that it is considered trite law that costs follow the cause/event, as described by Sir Dinshah Fardunji Mulla in his book *The Code of Civil Procedure*, 18th Edition, 2011 reprint 2012 at 540, is that costs must follow the event unless the court, for some good reasons, orders otherwise.

60. Additionally, the provision provides for ‘costs of and incidental to all suit or application’ which expression includes not only costs of suit but also costs of application in suit as described by Mulla (supra) at 536. Furthermore, Rtd. Justice Richard Kuloba in his book *Judicial Hints on Civil Procedure*, 2nd Edition, 2005 at 95 notes that the words ‘the event’ means the result of all the proceedings incidental to the litigation. Accordingly, the event means the result of the entire litigation. The order as to costs as provided for under section 27 remains at the discretion of the court.

61. The award of costs is therefore not cast in stone but courts have ultimate discretion. In exercising this discretion, courts must not only look at the outcome of the suit but also the circumstances of each case. In “*Morgan Air Cargo Limited – v Evrest Enterprises Limited* [2014] eKLR” the court noted that;

“The exercise of the discretion, however, depends on the circumstances of each case. Therefore, the law in designing the legal phrase that “Cost follow the event” was driven by the fact that there could be no “one-size-fit-all” situation on the matter. That is why section 27(1) of the [Civil Procedure Act](#) is couched the way it appears in the statute; and even all literally works and judicial decisions on costs have recognized this fact and were guided by and decided on the facts of the case respectively. Needless to state, circumstances differ from case to case.”

62. In this case, the Honourable Court reserves the discretion not to award any costs.



VI. Conclusion and Disposition.

63. Ultimately in view of the foregoing detailed and expansive analysis to the application, the Court arrives at the following decision and make below orders:-

- a. That the Notice of Motion application dated 17th August, 2023 by the Plaintiff be and is hereby found to lack merit and is dismissed in its entirety.
- b. That there are no orders as to costs.

It Is So Ordered Accordingly.

RULING DELIEVERED THROUGH MICROSOFT TEAM VIRTUAL MEANS, SIGNED AND DATED AT MOMBASA THIS 24TH DAY OF JUNE 2024.

.....

HON. MR. JUSTICE L. L. NAIKUNI

ENVIRONMENT AND LAND COURT AT

MOMBASA

Ruling delivered in the presence of:

- a. M/s. Firdaus Mbula, the Court Assistant.**
- b. Mr. James Oluoch Ogando the Plaintiff in person.**
- c. Mr. Kongere Advocate for the 1st Defendant.**
- d. M/s. Oduru Advocate for the 2nd Defendant.**

