



Mabeya & another v Nairobi City County Government & another (Environment & Land Petition E006 of 2024) [2024] KEELC 7292 (KLR) (31 October 2024) (Ruling)

Neutral citation: [2024] KEELC 7292 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND PETITION E006 OF 2024
OA ANGOTE, J
OCTOBER 31, 2024**

BETWEEN

GABRIEL MARIITA MABEYA 1ST PETITIONER

ABDI MUTHIORA 2ND PETITIONER

AND

NAIROBI CITY COUNTY GOVERNMENT 1ST RESPONDENT

SHAGILE LIMITED 2ND RESPONDENT

RULING

1. Vide a Notice of Motion dated 15th August, 2024, brought pursuant to the provisions of Article 159 of *the Constitution* of Kenya, Section 5(1) of the *Judicature Act*, Sections 1A, 1B, 3A of the *Civil Procedure Act* and Order 51(10) of the Civil Procedure Rules, the Petitioners/Applicants seek the following reliefs:
 - i. That the 1st Respondent County Executive Committee Member Built Environment and the Director of the 2nd Respondent namely Abdifatah Mohamed be committed to civil jail for six (6) months or for such longer time as the Court may deem fit for disobeying Court orders issued on the 20th May, 2024 extended on 15th July, 2024 by the Honourable Court in the presence of the Advocates for the Respondents.
 - ii. That the Honourable Court do grant any other Order it deems fit to grant.
 - iii. That the costs of this Application be borne by the Respondent.
2. The application is based on the grounds on the face of the Motion and supported by the Affidavit of Gabriel Mariita Mabeya, the 1st Petitioner/Applicant of an even date. He deponed that the Court



issued orders on 20th May, 2024, and extended on 15th July, 2024 restraining the Respondents from continuing with construction activities on plot no 36/1/777 Eastleigh.

3. According to the 1st Petitioner, the Respondents are aware of the Orders aforesaid, the same having been issued in the presence of their Counsel; that they further served the Respondents with the orders; that no Motion having been made to stay or vacate the Orders, they remain valid and binding and that the Respondents have deliberately disobeyed the same with the aim of defeating justice and rendering the suit otiose.
4. The 1st Petitioner deposed that the Defendants' actions constitute an affront to the dignity of the law and judicial process which the Court should not countenance; that contempt proceedings are criminal in nature and that the 2nd Respondent's Director should be held liable for their disobedience.
5. The 1st Respondent, through its County Executive Committee Member-Built Environment and Urban Planning, Mr Patrick Mbogo swore a Replying Affidavit on 23rd September, 2024. He deposed that the contempt application cites the CECM Built Environment and Urban Planning who is himself as well as the 2nd Respondent's Director; that on the 20th May, 2024, the Court issued orders restraining further construction activities on the suit property and that as advised by Counsel, the import of the orders was to restrain the 1st Respondent from proceeding with construction activities on the suit property.
6. He deposed that he was not a Respondent in the main Petition and application and there is no explanation as to why he, of all the County Officers has been cited; that he is not bound by the orders of 20th May, 2024; that in any event, neither the orders nor the application, the subject of the contempt, was ever personally served upon him and the Applicants have not proved any personal service and that he was unaware of the existence of the orders.
7. According to Mr Mbogo, the role of the 1st Respondent is to issue approvals, and supervise constructions to ensure developers compliance; that its role does not include taking part in building constructions; that he is unable to sufficiently defend himself due to the lack of clarity and particularity on the charges of contempt against him and that he has not disobeyed the orders of this Court.
8. He maintains that as advised by Counsel, contempt proceedings being quasi-criminal in nature cannot attract vicarious liability nor does the principle of agency apply; that the Applicants have in any event not proven that he is an agent of the 1st Respondent and that he has no control over the 2nd Respondent's actions/inactions and should not be held responsible for the same.
9. In response to the Motion, the 2nd Respondent, through its Director, Abdifatah Mohamed Gedi, swore a Replying Affidavit on the 18th September, 2024. He deposed that on or about the 20th May, 2024, the Court issued injunctive orders restraining the Respondents from continuing with further construction activities on Plot No 36/1/777 Eastleigh and that since the issuance of the aforesaid orders, no construction works or development has been undertaken on the suit property.
10. It is his contention that the Applicants and their Counsel willfully and knowingly misrepresented facts to the Court alleging that the 2nd Respondent's construction had resulted in dislodging of electricity poles, blockage of part of Galole Street and interfered with the storm drainage system all of which they know to be untrue and that nonetheless, the 2nd Respondent has undertaken all diligent efforts to comply with the Court Orders including sending home hundreds of labourers who were earning their daily keep at the construction site and violating several contracts with various suppliers.
11. Mr Gedi urged that the Court Orders have been, and continue to be extremely injurious and damaging to the 2nd Respondent who is in real-estate development; that the Applicants are not in a position to



compensate the 2nd Respondent for its losses; that the unsubstantiated allegations of contempt are not only false but defamatory and aimed at delaying the 2nd Respondents justice and that the Motion is unmerited and should be dismissed.

12. The 1st Petitioner with the authority of the 2nd Petitioner, filed a Supplementary Affidavit in which he deponed that having read the 1st and 2nd Respondents affidavits of 18th and 24th September, 2024, it is undisputed therein that the Court granted orders restraining any further constructions on the suit property and all parties were and are aware of the aforesaid orders.
13. He stated that as advised by Counsel on record, the accounting officer in the department of a County Government is the Executive Committee Member; that in this case, the 1st Respondent's deponent has not denied being the officer in charge; that the 2nd Respondent's deponent has admitted to being the 2nd Respondent's director, and that as advised by Counsel, is the accounting officer in that respect.
14. According to the deponent, vide its letter of 19th June, 2024, the 1st Respondent confirmed the existence of the Court Orders and the continued disobedience thereof by the 2nd Respondent and that they thereafter issued the 2nd Respondent with enforcement orders which they had no intention of enforcing as they continue to aid the 2nd Respondent in its breach.
15. The 1st Petitioner averred that at the start of the Petition, they annexed photos of the foundation by the 2nd Respondent; that the latest photographs show the 2nd Respondent has continued with its construction; that the 2nd Respondent has made no attempt to set aside the orders of the Court on the basis of having been prejudiced as they now allege and that the Motion is competent. The parties filed submissions and lists of authorities which I have considered.

Analysis and determination

16. Having considered the Motion, responses and submissions, the sole issue that arises for determination is whether the Respondents are in contempt of the Court Orders of 20th May, 2024. The Black's Law Dictionary (Ninth Edition) defines contempt of Court as:

“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.”
17. Discussing contempt, the Supreme Court in *Republic vs Ahmad Abolfathi Mohammed & another* [2019] eKLR posited thus;

“There is no doubt that an act in contempt of the Court constitutes an affront to judicial authority; and the Court has the liberty and empowerment to mete out penalty for such conduct, in a proper case. The object is, firstly, to vindicate the Court's authority; secondly, to uphold honourable conduct among Advocates, in their standing as officers of the Court; and thirdly, to safeguard its processes for assuring compliance, so as to sustain the rule of law and the administration of justice”
18. Due to the repeal of the *Contempt of Court Act*, 2016, [see *The Kenya Human Rights Commission vs Attorney General & Another* [2018] eKLR] the substantive law governing contempt proceedings is the *Judicature Act*, Section 5 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 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.”

19. Additionally, Section 29 of the [Environment and Land Court Act](#) under the title offences provides as follows:

“Any person who refuses, fails or neglects to obey an order or direction of the Court given under this Act, commits an offence, and shall, on conviction, be liable to a fine not exceeding twenty million shillings or to imprisonment for a term not exceeding two years, or to both.”

20. As a principle, a Court does not act in vain and its orders must at all times be respected. This was articulated by the Court of Appeal in *Shimmers Plaza Limited vs National Bank of Kenya Limited* [2015]eKLR as follows:

“We reiterate here that court orders must be obeyed. Parties against whom such orders are made cannot be allowed to trash them with impunity. Obedience of Court orders is not optional, rather, it is mandatory and a person does not choose whether to obey a court order or not. For as Theodore Roosevelt, the 26th President of the United States of America once said:-

“No man is above the law and no man is below it; nor do we ask any man’s permission to obey it. Obedience to the law is demanded as a right; not as a favour”.

The courts should not fold their hands in helplessness and watch as their orders are disobeyed with impunity left, right and centre. This would amount to abdication of our sacrosanct duty bestowed on us by [the Constitution](#). The dignity, and authority of the Court must be protected, and that is why those who flagrantly disobey them must be punished, lest they lead us all to a state of anarchy.”

21. It is trite that contempt proceedings are quasi-criminal in nature due to the severe consequences they attract. Consequently, the standard of proof in such proceedings is higher than the balance of probabilities in civil cases although not as high as beyond reasonable doubt. As stated by the Supreme Court in *Republic vs Ahmad Abolfathi Mohammed & another* [2018] eKLR:

“The standard of proof in cases of contempt of Court is well established. In the case of *Mutitika v. Baharini Farm Limited* [1985] KLR 229, 234 the Court of Appeal held that:

“In our view, the standard of proof in contempt proceedings must be higher than proof on the balance of probabilities, almost but not exactly, beyond reasonable doubt...The standard of proof beyond reasonable doubt ought to be left where it belongs, to wit, in criminal cases. It is not safe to extend it to an offence which can be said to be quasi-criminal in nature.”

The rationale for this standard is that if cited for contempt, and the prayer sought is for committal to jail, the liberty of the contemnor will be affected. As such, the standard of proof is higher than the standard in civil cases. This power, to commit a person to jail, must be exercised with utmost care, and exercised only as a last resort. It is of utmost importance, therefore, for the respondents to establish that the alleged contemnor’s conduct



was deliberate, in the sense that he or she willfully acted in a manner that flouted the Court Order.”

22. In order to succeed in civil contempt proceedings, the Applicant has to prove: the terms of the order were clear, unambiguous and binding on the Respondent; knowledge of these terms by the Respondent; failure by the Respondent to comply with the terms of the order and; deliberate conduct by the Respondent.

23. In the cases of North Tetu Farmers Co. Ltd vs Joseph Nderitu Wanjohi (2016) eKLR and Republic vs Attorney General & another Exparte Mike Maina Kamau [2020] eKLR Justice Mativo, dealing with the question of contempt relied on the exposition by the learned authors of the book “Contempt in Modern New Zealand” who succinctly stated:

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

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

24. The Applicants asserts that the Respondents are in contempt of this Courts’ Orders of 20th May, 2024. The Respondents contest this. The 2nd Respondent opines that no breach has been demonstrated whereas the 1st alleged contemnor, Mr Patrick Mbogo, states that he has been wrongfully cited and does not understand the nature of the allegations against him, his docket not being responsible for undertaking constructions. He also asserts that there has been no demonstration of the alleged breach.

25. The orders in question read:

“ That pending the hearing and determination of the Petition, the Respondents are hereby restrained from continuing with the construction activities on Plot 36/1/777 Eastleigh.

That the Officer in charge of the nearest police station do ensure that the orders are complied with.”

26. These orders were indeed extended on 15th July, 2024. Looking at the first test, there is no doubt that the Court’s orders of 20th May, 2024 were clear, precise and binding on the Respondents. Their import being to restrain construction activities on the suit property by the 2nd Respondent.

27. Moving to the aspect of knowledge, the 2nd Respondent concedes to having knowledge of the Court orders. The 1st Respondent’s agent however states that he was not aware of the same, not having been personally served.

28. Over time, Courts have moved away from the position that knowledge of court orders can only be demonstrated through personal service, and that personal service is a mandatory requirement before



contempt proceedings can be brought. The Court of Appeal, gave its stamp of approval to this position in the case of *Shimmers Plaza Limited vs National Bank of Kenya* [2015] eKLR, where it stated:

“We now revisit the issue of service. Was there service of the order said to have been disobeyed on the respondent? There is no dispute that no formal order was extracted and personally served on the respondent and an affidavit of service filed to that effect. In that respect, this case can be distinguished from *Justus Kariuki Mate & Another vs Hon. Martin Wambora* (Wambora case) supra cited by learned counsel for the applicant. On the other hand however, this Court has slowly and gradually moved from the position that service of the order along with the penal notice must be personally served on a person before contempt can be proved. This is in line with the dispensations covered under 81.8 (1) (supra). Kenya’s growing jurisprudence right from the High court has reiterated that knowledge of a court order suffices to prove service and dispense with personal service for the purposes of contempt proceedings. For instance, Lenaola J in the case of *Basil Criticos vs Attorney General and 8 Others* [2012] eKLR pronounced himself as follows:- “...the law has changed and as it stands today knowledge supersedes personal service...where a party clearly acts and shows that he had knowledge of a Court Order; the strict requirement that personal service must be proved is rendered unnecessary”

29. The Court of Appeal again pronounced itself in *Woburn Estate Limited vs Margaret Bashforth* [2016] eKLR citing the decision in *Refrigeration and Kitchen Utensils Ltd vs Gulabchand Popatlal Shah & Another*, Nairobi Civil Application No.39 of 1990, where it was observed that:

“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...he should apply to the court that it might be discharged. As long as it exists it must not be disobeyed.”

30. Indeed, this Court is bound by the decisions of the superior court to the effect that where it can be shown that a party has knowledge of a court order, personal service is not mandatory.
31. In the present circumstances, the record shows that the orders of 20th May, 2024 were given in the presence of Counsel for all the parties, including the 1st Respondent. It is trite that Advocates represent the interests of their clients. For that reason, where orders are made in the presence of a party’s Advocate on record, there is a reasonable presumption that Counsel will inform their clients of the decision of the court and the client is deemed to be aware of the said orders.
32. Nonetheless, Mr Mbogi has raised a critical question being whether he, as the member, CEC Built Environment, was the right person to be cited for contempt of this Court’s orders. Dealing with a similar predicament, the Court in *Lapana Limited vs County Government of Trans-Nzoia (Environment & Land Case 8 of 2023)* [2024] KEELC 45 (KLR) (18 January 2024) (Ruling) persuasively stated thus:

“As regards the County officer responsible for disobedience of the Court Orders, it is my find that it is the County Secretary to be at the heart of the fault. He/she is the principal officer tasked with the execution of the executive decisions of the County Government and should be answerable unless it is clearly shown that the act was specifically carried out by any other officer of the County Government directly and personally.



Section 44(3) of the County Government Act, [Act No. 17 of 2012](#), outlines the functions of the County Secretary in the following manner;

“(3)The county secretary shall-

be the head of the county public service; be responsible for arranging the business, and keeping the minutes, of the county executive committee subject to the directions of the executive committee; convey the decisions of the county executive committee to the appropriate persons or authorities; and perform any other functions as directed by the county executive committee”.

62. In Judicial Review Case 22 of 2019, Republic -vs- County Secretary, Nairobi City County & 3 others; Koceyo & Co. Advocates (Ex Parte) [2020] eKLR the learned Judge made the remarks regarding responsibility of the County Secretary in satisfying Court Orders. It was observed:

Section 44 of the County Government Act in this respect establishes the office of the County Secretary who is secretary to the County Executive Committee, and is answerable for the operations of the County Executive, and whose functions include being head of the county public service.

Since Section 44(3)(c) of the County Government Act bestows upon the County Secretary the responsibility to convey decisions of the County Executive Committee to the appropriate persons or authorities, it follows that it the County Secretary’s duty that the communication and decisions of other authorities and agencies, including Court Orders, are conveyed to the respective County Executive Committee member or offices through the County Secretary. He/she is the one charged with the County’s executive’s duty of ensuring that such decisions are followed. In the circumstances, disobedience of Court Orders will be visited, in the first instance, at the County Secretary, as the important link between the outside world and the operations County Government.”

33. The Court agrees. The allegations of contempt are as against the County as a whole and not as against a department within the County, in this case the Built Environment and Urban Planning sector.
34. The Applicants have made reference to the letter of 19th June, 2024 which is a site report as well as an enforcement notice dated the 14th June, 2024 asserting that these emanated from the 1st contemnor’s department. According to the Applicants, the foregoing documents prove that the 1st contemnors department had knowledge of the Orders and assisted the 2nd Respondent in their disobedience. That appears to be the basis for which they filed their claim of contempt against the 1st contemnor.
35. However, the orders in issue were to restrain any construction activities. There was no direction to the 1st Respondent through the Built Environment and Urban Planning Committee to undertake enforcement of these orders such that any continual construction by the 2nd Respondent can be said to constitute a breach on their part.
36. Indeed, even if the Court found that the 1st contemnor was a proper party in the circumstances, in view of the orders, he would only be liable if the 1st Respondent was undertaking construction activities on the property. There has been no demonstration in this respect.
37. Ultimately the claim of contempt against the 1st Respondent fails.
38. Moving next to whether the 2nd Respondent is in breach, it is the Applicant’s contention that they continued with construction even after the Court directed that it ceases.



39. With respect to the proof of the alleged breach, the Applicants have attached photographs. They assert that at the time the matter came to Court, the construction was at the foundation stage and the construction is now several floors up evincing the 2nd Respondent's continual construction. This is heavily disputed by the 2nd Respondent who maintains that they have duly obeyed the Court Orders.
40. Having keenly analyzed the photographs annexed, and bearing in mind the burden of proof for contempt, the Court opines that the same are inadequate to aid the application. While GMM4 indeed shows a building that is several floors up, questions still abound as to whether this is indeed the suit property and when precisely the alleged construction was undertaken. Bare photos as herein, which have in any event not been accompanied by a certificate of electronic evidence cannot suffice. The claim for contempt as against the 2nd Respondent also fails.
41. The upshot of the foregoing is that the application dated 15th August, 2024 is unmerited and is dismissed with costs.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 31ST DAY OF OCTOBER, 2024.

O. A. ANGOTE

JUDGE

In the presence of;

Mr. Bashir for 2nd Respondent

Mr. Oduor for Petitioner

Court Assistant: Tracy

