



REPUBLIC OF KENYA



Makokha v Mwananchi Credit Ltd & another (Miscellaneous Civil Application E152 of 2024) [2025] KEHC 7919 (KLR) (28 May 2025) (Ruling)

Neutral citation: [2025] KEHC 7919 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
MISCELLANEOUS CIVIL APPLICATION E152 OF 2024**

S MBUNGI, J

MAY 28, 2025

BETWEEN

MILKA KHASIRO MAKOKHA APPLICANT

AND

MWANANCHI CREDIT LTD 1ST RESPONDENT

FORESIGHT AUCTIONEERS 2ND RESPONDENT

RULING

1. The applicant filed a motion under Certificate of Urgency seeking the following orders:
 - a. Spent
 - b. That the 1st and 2nd respondents be cited for contempt or be found to be in contempt of court for disobeying the orders made on 15.07.2024 in Kakamega CMCC No. E106/2024.
 - c. That upon finding in 2 above, the respondents be punished appropriately for disobeying court orders in issue.
 - d. That costs hereof be provided for.
2. The application was premised on the grounds that the respondents herein, despite participating in the trial court proceedings and hearing interpartes upon which Hon. J. R. Ndururi issued the orders of 15.07.2024, the respondents have refused and neglected to comply with the said orders.
3. The application is supported by an affidavit Milka Khasiro Makokha, the applicant herein, sworn on 5th November, 2024, wherein she deponed that on 15th July 2024, the trial court issued orders directing the 2nd respondent, acting as an agent of the 1st respondent, to release Motor Vehicle Registration Number KCY 788P.



4. She averred that the respondents, who were duly represented during the proceedings in the primary suit, were aware of the said orders and even filed an application dated 15th August 2024 seeking to set aside the same.
5. Despite this, the respondents have willfully refused to comply with the court orders. She further stated that her repeated efforts to have the vehicle released have been futile, with the 2nd respondent alleging lack of instructions from the 1st respondent. The applicant contends that the respondents' conduct amounts to willful disobedience of lawful court orders, undermines the authority of the court, and warrants punishment for contempt.
6. The 1st respondent filed a preliminary objection dated 28th January, 2025 in response to the application based on the following grounds:
 - i. The Application has been brought before the wrong court.
 - ii. The Application offends the provisions of Section 10 of the Magistrates Court Act (2015) which allows applicants to prosecute such applications in the primary suits.
 - iii. The orders sought are more of substantive in nature which cannot be granted under such provisions of a Miscellaneous Application.
 - iv. The applicant has brought this application before a wrong forum.
7. The 1st Respondent therefore prayed that the application be dismissed.
8. The court directed that the application be canvassed by way of written submissions. At the time of writing this ruling, only the applicant had filed.

Applicant's Case.

9. Vide submissions dated 18th April, 2025, the applicant submitted that the respondent's preliminary objection dated 28th January 2025 raises, in part, matters that are properly classified as preliminary points of law, particularly the first two grounds which touch on the jurisdiction of this court.
10. However, the applicant argued that the third ground, alleging that the orders sought are substantive and therefore not grantable through a miscellaneous application, is not a pure point of law and thus does not qualify as a preliminary objection within the meaning outlined in *Mukisa Biscuits Manufacturing Co. Ltd v West End Distributors Ltd* [1969] EA 696.
11. On the issue of jurisdiction, the applicant submitted that although Section 10 of the *Magistrates' Courts Act* provides for contempt proceedings in the lower court, the same is limited to contempt committed in the face of the court. The applicant cited the decision in *Kenya Human Rights Commission v Attorney General & Another* [2018] eKLR, where the *Contempt of Court Act* (No. 46 of 2016) was declared unconstitutional, thereby reviving Section 5 of the *Judicature Act* as the operative legal framework on contempt proceedings. Accordingly, it was submitted that the High Court retains jurisdiction to hear and determine contempt proceedings arising from orders issued by the magistrates' courts, where the contempt is not committed in the face of the court.
12. Further reliance was placed on *Republic v Kajiado County & 2 Others ex parte Kilimanjaro Safari Club Ltd*, where the court held that following the invalidation of the *Contempt of Court Act*, the applicable law on contempt remains Section 5 of the *Judicature Act*, read together with the English Civil Procedure Rules, particularly Part 81 and Rule 81.8 which govern service and enforcement of court orders. The applicant argued that this legal framework permits the filing of a miscellaneous



application before the High Court for contempt of court, including for orders issued by subordinate courts.

13. The applicant also cited *Githiga & 5 Others v Kiru Tea Factory Company Ltd* (Petition 13 of 2019) [2023] KESC 41 (KLR), where the Supreme Court affirmed that courts possess inherent power to enforce their orders through contempt proceedings, and that the operative provisions remain under Section 5(1) of the *Judicature Act*.
14. To further support the propriety of filing such an application before the High Court, the applicant referred to *Bryc Broadcast & Technologies K Ltd v Makotsi & Another* (Misc Application No. E032 of 2023) [2024] KEHC 2052 (KLR), where the High Court entertained and allowed a similar application for contempt based on orders issued in a magistrate's court.
15. In view of the foregoing, the applicant maintained that this court is the proper forum for enforcing compliance with the lower court's orders and that a miscellaneous application is the appropriate procedure for bringing such proceedings. The applicant submitted that consequently, the preliminary objection lacks merit and ought to be dismissed with costs to the applicant.

Analysis and Determination

16. I have considered the application, submissions annexures and the preliminary objection as filed and argued. This court must first determine whether the objection meets the threshold for a preliminary objection as was stated in the case of *Mukisa Biscuits Co. Ltd v West End Distributors Ltd*. [1996] EA 696 case.
17. The issue of preliminary objections was addressed in the case of *Mukisa Biscuits Manufacturing Co. Ltd v West End Distributors Ltd*. [1969] EA 696. where Lord Charles Newbold P. held that a proper preliminary objection constitutes pure points of law. The Learned Judge then held that:

“The first matter relates to the increasing practice of raising points, which should be argued in the normal manner, quite improperly by way of Preliminary objection. A preliminary Objection is in the nature of what used to be a demurer it raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought in the exercise of judicial discretion. The improper raising of points by way of Preliminary objection does nothing but unnecessarily increase costs and, on occasion, confuse the issue. The improper practice should stop”
18. In *Attorney General & Another v Andrew Mwaura Githinji & another* [2016] eKLR, the court was explicit on the scope, nature and meaning of a Preliminary Objection in the following terms:
 - (i) A Preliminary Objection raised a pure point of law which is argued on the assumptions that all facts pleaded by other side are correct.
 - (ii) A Preliminary Objection cannot be raised if any fact held to be ascertained or if what is sought is the exercise of judicial discretion; and
 - (iii) The improper raise of points by way of preliminary objection does nothing but unnecessary increase of costs and on occasion confuse issues in dispute.”
19. From the preliminary objection and application filed, I isolate the following key issues for determination:



- i. Whether this court has jurisdiction to hear and determine the application as filed by the applicant.
- ii. Whether the respondents herein are in contempt of the court orders issued on 15th August, 2024.

Issue 1: Whether this court has jurisdiction to hear and determine the application

20. The court in the case of Owners of the Motor Vessel “Lillian S” v Caltex Oil (Kenya) Ltd [1989] eKLR addressed the issue of jurisdiction as follows: -

“...Jurisdiction is everything. Without it, a Court has no power to make one more step. Where a Court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A Court of law down tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction...”

21. The respondent has challenged the jurisdiction of this court to determine the present application in its preliminary objection, stating that the Application offends the provisions of Section 10 of the Magistrates Court Act (2015) which allows applicants to prosecute such applications in the primary suits. In rebuttal, the applicant has stated that the Act is limited to contempt committed in the face of the court.

22. Section 10 of the Magistrate’s Court Act provides as follows:

“10. Contempt of Court

- (1) Subject to the provisions of any other law, the Court shall have power to punish for contempt.
- (2) A person who, in the face of the Court —
 - (a) assaults, threatens, intimidates, or insults a magistrate, court administrator, judicial officer, or a witness, during a sitting or attendance in Court, or in going to or returning from the Court;
 - (b) interrupts or obstructs the proceedings of the Court; or
 - (c) without lawful excuse disobeys an order or direction of the Court in the course of the hearing of a proceeding, commits an offence.
- (3) In the case of civil proceedings, the willful disobedience of any judgment, decree, direction, order, or other process of a court or willful breach of an undertaking given to a court constitutes contempt of court.
- (4) In the case of criminal proceedings, the publication, whether by words, spoken or written, by signs, visible representation, or otherwise, of any matters or the doing of any other act which—



- (a) scandalizes or tends to scandalize, or lowers or tends to lower the judicial authority or dignity of the court;
 - (b) prejudices, or interferes or tends to interfere with, the due course of any judicial proceedings; or
 - (c) interferes or tends to interfere with, or obstructs or tends to obstruct the administration of justice, constitutes contempt of court.
- (5) A police officer, with or without the assistance of any other person, may, by order of a judge of the Court, take into custody and detain a person who commits an offence under subsection (2) until the rising of the Court.
 - (6) The Court may sentence a person who commits an offence under subsection (1) to imprisonment for a term not exceeding five days, or a fine not exceeding one hundred thousand shillings, or both.
 - (7) A person may appeal against an order of the Court made by way of punishment for contempt of court as if it were a conviction and sentence made in the exercise of the ordinary original criminal jurisdiction of the Court.
 - (8) The Chief Justice may make Rules to regulate procedures relating to contempt of court.”

23. It is evident that the Magistrates’ Court Act at Section 10 deals specifically with contempt committed in the face of the court, such as interruptions during court proceedings, threats to judicial officers, and disobedience occurring during an ongoing hearing. This limitation excludes instances of contempt that occur outside the courtroom, such as non-compliance with orders issued after proceedings have concluded.

24. The *Contempt of Court Act*, 2016, which previously governed contempt proceedings more broadly, was declared unconstitutional in *Kenya Human Rights Commission v Attorney General & Another* [2018] eKLR. Consequently, the operative law reverted to Section 5(1) of the *Judicature Act*, which provides that:

“5. Contempt of court

- 1. The High Court and the Court of Appeal shall have the same power to punish for contempt of court as is for the time being possessed by the High Court of Justice in England, and such power shall extend to upholding the authority and dignity of subordinate courts.”



25. This position was held in *Republic v Kajiado County & 2 Others ex parte Kilimanjaro Safari Club Limited* where the court stated thus –

“This section was repealed by section 38 of the Contempt of 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.”

26. The effect of this legal framework is that the High Court retains jurisdiction to punish for contempt of court even where the orders in question were issued by subordinate courts, as long as the contempt did not occur in *facie curiae* (in the face of the court). This was affirmed in *Republic v Kajiado County & 2 Others ex parte Kilimanjaro Safari Club Ltd* and in *Githiga & 5 Others v Kiru Tea Factory Company Ltd* (Petition 13 of 2019) [2023] KESC 41 (KLR).

27. In the present case, the alleged contempt was not committed in the face of the magistrate’s court. The application was properly brought before this Court under the *Judicature Act* and applicable common law principles. Therefore, this Court finds and holds that it has jurisdiction to hear and determine the application as filed.

Issue 2: Whether the respondents herein are in contempt of the court orders issued on 15th August, 2024.

28. The Court in *Kenya Human Rights Commission v Attorney General & another* stated as follows:

“Contempt is the willful disobedience or disregard of a court orders, judgments decrees or directions. It is therefore the offence of being disobedient or discourteous towards courts and their officers in the form of behavior that opposes or defies the authority, justice and dignity of the court. Contempt manifests itself in the willful and intentional disregard of or disrespect for the authority of the courts, a behavior that is regarded illegal because does not obey or respect the authority of the courts and their processes and tends to lower the dignity of the courts. ”

29. Mativo J. restated the test for establishing contempt in his decision in *Samuel M. N. Mweru & Others v National Land Commission & 2 others* [2020] eKLR where he stated –

“40. It is an established principle of law that 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. Perhaps the most comprehensive of the elements of civil contempt was stated



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.."

The terms of the order.

30. The central question is whether the respondents willfully disobeyed clear court orders issued by the trial court. The record indicates that on 15th August, 2024, the Magistrate's Court in Kakamega CMCC No. E106 of 2024 issued the following orders:

- "1. That pending the hearing of this suit a mandatory order of injunction is hereby issued compelling the 2nd respondent to release the motor vehicle registration number KCY 788P to the applicant
2. That pending the hearing of this suit the respondent jointly and severally be is hereby restrained by an order of temporary injunction from disposing off and/or selling motor vehicle registration number KCY 788P.
3. That this matter is fixed for hearing 19th September, 2024"

Knowledge of the terms by the respondent.

31. The respondents were duly represented by the firm of Mwaka & Co. Advocates during the proceedings where the orders were issued. It follows that the respondents had knowledge of the terms of the court orders. This position is consistent with the holding in *Shimmers Plaza Limited v National Bank of Kenya Limited* [2015] eKLR, where the Court stated that a party's knowledge of a court order can be inferred where their counsel is on record and I quote:

"Would the knowledge of the judgment or order by the advocate of the alleged contemnor suffice for contempt proceedings" We hold the view that it does. This is more so in a case such as this one where the advocate was in Court representing the alleged contemnor and the orders were made in his presence. There is an assumption which is not unfounded, and which in our view is irrefutable to the effect that when an advocate appears in court on instructions of a party, then it behoves him/her to report back to the client all that transpired in court that has a bearing on the client's case."

32. Further perusal of the court file also shows that the respondent through M/s Mwaka & Co. Advocates filed a motion dated 15th August, 2024 in the trial court seeking the following orders:

- "1. That the application be certified as urgent and service of the same be dispensed with in the first instant.



2. That there be a stay of execution of court orders/ruling issued on 15th August, 2024 pending the hearing and determination of this application interpartes
 3. That the court orders/ruling issued on the 15th day of August, 2024 be reviewed, vacated or set aside
 4. That the ruling/orders of court of the 15th day of August, 2024 be substituted with an order directing the plaintiff to clear all pending loan installment arrears and to continue servicing the loan as condition for the release of motor vehicle Reg. No. KCY 788P
 5. That costs of this application be provided for”
33. From the above application, it is evident that the respondents herein were well aware of the orders issued. Their filing of the above application on the same day, seeking to challenge and overturn the said orders reflected their cognizance of the orders issued by the trial court.

Failure of the Respondent to comply with the terms of the order.

34. The orders of the court were clear and unambiguous, specifically directing the release of the subject motor vehicle. Despite this clarity and the respondents’ knowledge of the order, the 2nd respondent failed to release the vehicle, citing lack of instructions from the 1st respondent. This explanation does not exonerate either party.

Finding of the court.

35. It is clear that the court’s order of 15.08.2024 were couched in very simple and straight English words such that no other meaning could have ascribed to the order other than stopping the respondents from disposing the motor vehicle registration No. KCY 788P, and that the 2nd respondent releases the said motor vehicle to the applicant.
36. The law is very clear. A party whom a court order is directed to by a competent court has no choice other than to first comply with the order, even if to the party the order is irregular or before taking any step, if not sure of the import of the court order, the party is supposed to rush back to court and explain its difficulties in complying with the particular court order but not to disregard the order.
37. In *Trusted Society of Human Rights Alliance v Cabinet Secretary for Devolution and Planning & 3 others* [2017] eKLR the court held as follows:
- “The Court does not, and ought not to be seen to make orders in vain; otherwise the Court would be exposed to ridicule, and no agency of the constitutional order would then be left in place to serve as a guarantee for legality, and for the rights of all people. A Court order is binding on the party against whom it is addressed and until set aside remains valid and is to be complied with”
38. From the foregoing, it is my finding that failure by the alleged contemnors to release the suit motor vehicle was deliberate and thus the applicant has discharged his burden of proof to the satisfaction of this court.
39. Having found so, I therefore proceed and find that the alleged contemnors are in contempt of this court orders of 15.08.2024 and consequently cite them for contempt.



40. Considering the circumstances of this case and the material placed before the court, I am satisfied that the application is merited. Consequently, I order as follows:

- I. The preliminary objection by the respondent fails. It hereby struck out.
- II. The motion by the Applicant seeking to cite the respondents for contempt of court dated 15.08.2024 is hereby allowed and the Respondents are found to be in contempt of Court for disobeying the Court's orders of 15.08.2024.
- III. The contemnors are hereby directed to purge their contempt within the next seven (7) days.
- IV. In default of compliance with order (b) above, a Notice to Show Cause do issue against the contemnors to appear in person before the Court to show cause why they should not be committed to civil jail or fined.
- V. Mention/Hearing/Mitigation on
- VI. Costs to the respondents .

DATED , SIGNED AND DELIVERED IN OPEN COURT AT KAKAMEGA THIS 28TH DAY OF MAY, 2025

S.N MBUNGI

JUDGE

In the presence of :

Court Assistant – Elizabeth Angong'a

