



Yatani v Raso (Civil Suit E029 of 2021) [2024] KEHC 3513 (KLR) (Civ) (20 March 2024) (Ruling)

Neutral citation: [2024] KEHC 3513 (KLR)

REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CIVIL
CIVIL SUIT E029 OF 2021
CW MEOLI, J
MARCH 20, 2024

BETWEEN

UKUR YATANI APPLICANT

AND

DIDO ALI RASO RESPONDENT

RULING

1. The subject of this ruling is the Notice To Show Cause (NTSC) issued by this court upon making a finding of contempt of court against Hon. Dido Ali Raso. The pertinent background is as follows. Hon. Ukur Yatani (hereafter the Applicant) moved this court vide a motion dated 22.11.2021 seeking inter alia that the court be pleased to find that Hon. Didi Ali Raso was in contempt of court for disobedience of the orders issued by this court on 21.09.2021; that summons do issue to the Respondent, requiring him to appear in person to show cause why he should not be punished for contempt; that the court does issue an order for the Respondent to be committed to civil jail for a period of six (6) months for contempt of court; and that the court be pleased to grant any other orders as the interest of justice dictates for the purpose of protecting the dignity and authority of the court.
2. The motion was subsequently heard by this court and by its ruling delivered on 16.03.2023, the court held that; -

“In the result, the court is persuaded that the motion dated 22.11.2021 is merited. It is allowed by way of a finding that the Respondent is in contempt of the order of Ongudi, J. of 21.09.2021 and a notice shall forthwith issue for the Respondent to appear in person on 9.05.2023 to show cause why he should not be punished for the contempt. In the meantime, and for this purpose, the Respondent may file an affidavit and or submissions within 21 days, and upon service, the Applicant may equally file an affidavit and or submissions.”



3. When the parties appeared before the court on 09.05.2023, the court reiterated its earlier orders and directed Hon. Dido Ali Raso (hereafter the Contemnor) to comply with the court's directions granted liberty to the Applicant to file any affidavit deemed necessary.
4. In compliance with the foregoing directions, the Contemnor filed a Replying Affidavit dated 23.06.2023 in response/mitigation to the NTSC. The gist of his affidavit is that as a leader representing Saku Constituency and the greater Marsabit Community, he has great respect for the court and would be the last person to breach any orders made against him. He asserts that he did not knowingly defy the orders made by Ongudi, J. and that he had made a statement representing his opinion as a fair comment regarding matters of public interest relating to security within Marsabit County.
5. He goes on to depose that any statement allegedly made on 05.11.2021 was in exercise of his democratic right both as a leader and citizen of the Republic of Kenya. And that pursuant to the freedom of speech and as a representative of the people, it was imperative of him to comment on matters concerning his constituents in order to nudge action from state agencies to ensure security within Marsabit County. He further states that he was acting out of responsibility, in good faith and with utmost respect to the court as a lawmaker, and that his statements were not personally directed towards the Applicant but have always been for the greater interest of the people of Marsabit County, and particularly Saku Constituency.
6. Arguing that constitutional values do not permit imprisonment in enforcement of a civil order, he states that if the court decide to punish for contempt, it should be by an order of damages and not committal to civil jail. That the constituents of Saku Constituency will be greatly disenfranchised if he was to be committed to civil jail. In summation, he states that the court ought to consider the nature of the issues raised in the offending statement and that it is in the interest of justice, fairness and expedient in all circumstances of the matter that the court considers the totality of his affidavit.
7. Brief submissions were further filed by the Contemnor in respect of the NTSC. Counsel for the Contemnor began by reiterating that the latter is a lawmaker, having been elected as Member of Parliament Saku Constituency, Marsabit County hence has utmost respect for the rule of law and would not deliberately break the law or disobey a court order. It was further submitted that should the court be inclined to punish the Contemnor, such punishment ought not to be so severe as to constitute imprisonment. The decision in *Samuel M. N. Mweru & others v National Land Commission & 2 others* [2020] eKLR was relied on in the foregoing regard.
8. Counsel contended, that the Contemnor had never before been cited for contempt of court and is deeply apologetic over the unintended disobedience, and therefore a warning would be sufficient in the circumstance. In the alternative the Contemnor ought to be condemned to pay nominal damages for the legal wrong and accorded a chance to defend the matter during trial. In conclusion, the court was urged to balance its discretion to punish the Contemnor, as against the public interest, especially prejudice against the people of Saku Constituency, if their member of parliament was to be imprisoned for contempt, leaving them unrepresented in parliament.
9. The Applicant on his part opted to rely on his affidavit material in respect of his earlier motion dated 22.11.2021 regarding the instant NTSC. The court has considered the respective affidavit material and submissions. Section 5 of the *Judicature Act* provides that;
 - (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.
10. As earlier noted, this court by its ruling delivered on 16.03.2023 substantially pronounced itself, and entered a finding that Hon. Dido Ali Rasso was in contempt of the earlier orders issued against him. Consequently, pursuant to the NTSC, what falls to be determined is the requisite punishment for the Contemnor's contempt. Odunga, J (as he then was) in *Miguna Miguna v Fred Matiang'i, Cabinet Secretary Ministry of Interior and Co-ordination of National Government & 8 others* [2018] eKLR rightly observed that:-
- “ 8. Contempt of court is no doubt an affront to judicial authority and therefore is not a remedy chosen by a party but is invoked to uphold the dignity of the court..... I reiterate what I said in the earlier ruling that those who disobey Court orders risk being declared by the Court to have breached Article 10 of the *Constitution* which prescribes national values and principles of governance with the attendant consequences among other appropriate sanctions.....
9. In deciding what sanction to mete this Court must reflect on the need to maintain the rule of law and to ensure that the authority and the dignity of our Courts are upheld at all times and to stamp the Court's authority and uphold the values and principles of governance enshrined in Article 10 of the *Constitution*”.
11. The sanction provided for contemptuous conduct is intended to uphold the sanctity or dignity of the court and the rule of law. Ojwang, J (as he then was) fittingly stated in *B v Attorney General* [2004] 1 KLR 431 that:
- “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.”
12. The Applicant had through his application specifically sought “...that the court does issue an order for the Respondent to be committed to civil jail for a period of six (6) months for contempt of court and that the court be pleased to grant any other orders as the interest of justice dictates for the purpose of protecting the dignity and authority of the court”. In deflecting this prayer, the Contemnor has reiterated his public officer status and duties and asserted that the constituents of Saku Constituency will be greatly disenfranchised if he were to be committed to civil jail. Proposing therefore that punishment ought to take the form of damages and not committal to civil jail.
13. There is no prescribed punishment for contempt of court, save that judicial discretion is donated to the High Court by dint of Section 5 of the *Judicature Act*. (See: Court of Appeal in *Christine Wangari Gachege v Elizabeth Wanjiru Evans & 11 others* [2014] eKLR and *Alfred Mutua v Boniface Mwangi* [2022] eKLR). The lacuna resulted from the fact that The *Contempt of Court Act* which provided for the mode of punishment for contempt was declared unconstitutional in *Kenya Human Rights Commission v Attorney General & another* [2018] eKLR. Therefore, presently the punishment of contempt remains in the realm of judicial discretion, which however ought to be exercised judicially, cautiously, depending on the circumstances obtaining and hence, on a case-by-case basis. See: *Sheila Cassatt Issenberg & another v Antony Machatha Kinyanjui* [2021] eKLR.



14. The right to liberty is enshrined in Articles 29 (1) (a) and 39(1) of the Constitution. These rights together with the right to freedom of expression under Article 33 of the Constitution, the latter which the Contemnor has espoused in his material, are not absolute and must be exercised in a manner that does not prejudice the rights and fundamental freedoms of other citizens. See Article 24(1) (d) of the Constitution.
15. The justification-cum-mitigation advanced by the Contemnor against his committal to civil jail has been considered. Reading through the said Contemnor's material, the Court is concerned that Contemnor, while eschewing an outright mea culpa, was at pains to justify his wrongful actions on his public duties and constitutional rights. And in seeming disregard of the prescriptions of Article 24(1) (d). Certainly, no matter the circumstances obtaining, it could not be that part of the Contemnor's duties as the MP Saku was to disobey court orders, all in alleged service to his constituents. The court takes a dim view of this kind of approach. It renders hollow the Contemnor's avowed respect for the rule of law. In so saying, the Court is not oblivious of the challenging security situation in Northern Kenya and the tensions surrounding it. However, there can be no excuse or justification for a state officer to brazenly defy a court order under the guise of addressing the situation.
16. That being said, the committal of Contemnor to civil jail would have ramifications for the constituents of Saku Constituency who elected the Contemnor as their MP. Ideally, outright committal to civil jail without the option of a fine ought to be a last resort and reserved for the more recalcitrant contemnor, all depending on the facts at hand. The proposal by the Contemnor for payment of nominal damages, coming at this stage in the matter, appears to the court a novel form of punishment for contempt for which no precedent was tendered.
17. Considering all the relevant matters the Court is persuaded that in this instance, a warning and a sanction by way of imposition of a fine would adequately vindicate the rule of law while addressing the Contemnor's conduct. The amount of fine to be imposed in the High Court is discretionary. See. MNN v IMM [2022] eKLR, Miguna Miguna (supra), Voi Development Company Limited (supra), Simon Kamau & 19 others v Director of Pensions & another [2016] eKLR and Cleophas Wakhungu Malala v Speaker Kakamega County Assembly & 2 others [2014] eKLR.
18. In the result the Court will make the following orders against the Contemnor:
 - a. The Court hereby issues a warning to the Contemnor to henceforth cease and desist from any further acts of contempt in relation to the orders issued herein on 21.09.2021, pending the determination of this case.
 - b. The court hereby condemns the Contemnor to pay a fine in the sum of Kshs 100,000/- (One Hundred Thousand) within 14 days, in default of which he will be committed to serve a term of 21 (twenty-one) days in civil jail.
19. All the costs occasioned by the proceedings pursuant to the court's finding of contempt against the Contemnor shall be borne by the Contemnor.

DELIVERED AND SIGNED ELECTRONICALLY AT NAIROBI ON THIS 20TH DAY OF MARCH 2024.

C.MEOLI

JUDGE

In the presence of:

For the Applicant: Ms. Saina



For the Respondent: Ms. Kwamboka

Contemnor: present

C/A: Carol

