



**Nduva & 3 others v Ndar & 3 others; Ng'ang'a (Intended Interested Party)
(Civil Case 24 of 2017) [2024] KEHC 8118 (KLR) (Civ) (27 June 2024) (Ruling)**

Neutral citation: [2024] KEHC 8118 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

CIVIL CASE 24 OF 2017

CW MEOLI, J

JUNE 27, 2024

BETWEEN

**MICHAEL MUSEMBI NDUVA 1ST PLAINTIFF
MARY GORETTI GITARI MUNYI 2ND PLAINTIFF
URBANUS MUTHAI KINUTHIA 3RD PLAINTIFF
ST. CATHERINE MULLIGAN 4TH PLAINTIFF**

AND

**JOHN NDAR 1ST DEFENDANT
SUSAN NJERU 2ND DEFENDANT
ISAYA NYABERA 3RD DEFENDANT
REGISTRAR OF DOCUMENTS 4TH DEFENDANT**

AND

JAMES MUIRURI NG'ANG'A INTENDED INTERESTED PARTY

RULING

1. This ruling relates to two (2) applications. The first application to be filed is the Notice of Motion dated 8th September 2023 (the first Motion) brought by James Muiruri Ng'ang'a (hereafter the Intended Interested Party) and is expressed to be brought under Order 51 Rule 1 of the *Civil Procedure Rules* (CPR). It is premised upon the grounds on its body and depositions in the affidavit of the Intended Interested Party.
2. The first Motion seeks the following orders:-



1. (Spent).
2. That leave be granted to the Applicant to be enjoined as Interested Party after judgment.
3. That upon the Court granting prayer number two (2) in this Application, this Court be pleased to order for stay of execution, vary or set aside the judgment entered and delivered herein pending the hearing and determination of the substantive issues raised by the Applicant's Application.
4. That in the alternative to prayer number three (3) above, this Honourable court be pleased to grant the applicant leave to appeal out of time against the judgment delivered by the Honourable Justice C Meoli on 6th April 2023.
5. That in further alternative to prayer 3) above this Court be pleased to order for stay of execution of the judgement entered on 6th April 2023 and decree dated 6th July 2023 pending the hearing and determination of would be intended appeal.
6. “
3. In his supporting affidavit, the Intended Interested Party asserted to be one of the trustees of St. Vincent De Paul Society Kenya Registered Trustees (hereafter the Trust) and having previously served as the Assistant Secretary of the Society of St. Vincent De Paul, Superior Counsel of Kenya (the Society). That he came to learn of the existence of the judgment delivered by this court on 6th April, 2023 upon being served with a letter dated 22nd August, 2023 to that effect. The Intended Interested Party went on to state that by virtue of his position as a trustee, he stands to be affected by the aforesaid judgment, yet he was never enjoined as a party to the suit, during its pendency.
4. He averred that he has a stake in the proceedings and because his interests were not well articulated in the aforesaid judgment, it would be proper that he be granted leave to be enjoined as a party, to enable him to ventilate his case. And thereby obviate the risk of being denied his constitutional right to be heard. He further asserted that the judgment was obtained through non-disclosure and misrepresentation of facts. Including the fact that the Trust operated from Karen whereas in fact its offices are situated in Ozanam House Eastleigh Phase 1 as well as the fact that the trust is self-regulating in nature and not governed by a foreign superintendent as was alleged in the suit.
5. The Intended Interested Party swore that the first Motion has been timeously brought and any delay occasioned in moving the court can be explained by the fact that at the time of receiving the letter informing him of the judgment, the Intended Interested Party was nursing his ailing father who eventually died, and hence he was unable to move the court sooner. That in the premises, it would be in the interest of substantive justice for the court to grant him an opportunity to be enjoined in order for him to ventilate his grievances on appeal, by being granted leave to file an appeal out of time.
6. Michael Musembi Nduva (hereafter the 1st Plaintiff) swore a replying affidavit on 23rd October, 2023 to resist the first Motion, stating that he is a trustee of the Trust, pursuant to the judgment delivered on 6th April, 2023. The 1st Plaintiff termed the first Motion as misconceived and constituting an abuse of the court process, since it is essentially seeking to litigate over a dispute that has already been determined. He further stated that joinder of parties can be sought at any point in the proceedings, but before judgment and consequently, the first Motion is void ab initio.



7. He further asserted that in any event, the Intended Interested Party was removed from the membership of the Trust, vide a special general meeting which held on 9th December, 2017 as confirmed by the Registrar of Societies to the subsequent office bearers on 1st March, 2018. That the Intended Interested Party is therefore not a trustee, as he alleges. That moreover, the conditions pertinent to the grant of leave to appeal out of time or stay of execution have not been satisfied in the first Motion, the 1st Plaintiff adding that no draft memorandum of appeal has been exhibited to indicate the grounds of the intended appeal. The 1st Plaintiff therefore prayed that the first Motion be dismissed with costs.
8. The Intended Interested Party rejoined with a supplementary affidavit sworn on 13th March, 2024 wherein he restated that he was a duly appointed trustee of the Trust. He similarly swore a further supplementary affidavit on 30th April, 2024 pursuant to leave granted by the court on 29th April, 2024, averring that Mary Goretti Gitari Munyi (hereafter the 2nd Plaintiff) died on 30th April, 2022 and subsequently buried in early May, 2022, a fact not brought to the attention of the court at the time of delivering its judgment. That the 1st Plaintiff could not therefore be heard to swear affidavits on behalf of the now deceased 2nd Plaintiff.
9. Subsequently, the 1st Plaintiff herein together with Mary Goretti Gitari Munyi, Urbanus Muthai Kinuthia and St. Catherine Mulligan, (hereafter the 2nd, 3rd and 4th Plaintiffs respectively) filed the Notice of Motion dated 26th October, 2023 (the second Motion) supported by the grounds set out on its body and the affidavit of the 1st Plaintiff. The motion invokes sections 1A,1B,3A and 63(e) of the Civil Procedure Act (CPA) and Order 51 of the CPR. Therein, the Plaintiffs prayed that:
 - 1) (Spent).
 - 2) Pending the hearing and determination of this Application, this Honourable Court be pleased to cite John Ndar for contempt of the decree issued on 6th July 2023.
 - 3) Pending the hearing and determination of this Application, the Contemnor, John Ndar, be hereby directed to purge his contempt within two (2) days by releasing the following items to the Plaintiffs' advocates CM Advocates LLP forthwith:
 - i. Original Certificate of Incorporation.
 - ii. The trust deed.
 - iii. The Official Seal.
 - iv. The title deeds for the various properties owned by the Trust.
 - v. The statements of accounts for the past 10 years.
 - vi. Bank details of all bank accounts held by the Trust.
 - vii. The files holding the records of the Trust, minutes, letters and letter heads.
 - viii. Any other official documents belonging to the Trust in his possession.
 - 4) In default of compliance with Order 3) above, a Notice to show cause be issued against the Contemnor to appear in person before the court to show cause why he should not be punished for disobedience of this Court's orders.



- 5) The Contemnor be punished for contempt by jailing or any other means as the court will deem fit.
- 6)
10. In his supporting affidavit, the 1st Plaintiff deposed that John Ndar (hereafter the 1st Defendant) was at all material times represented by counsel in the suit. And that following delivery of the judgment on 6th April, 2023 he was served with copies of the court order on 22nd August, 2023 and 29th September, 2023 accompanied by letters requiring him to surrender the above-listed items which were in his possession at all material times, which orders he blatantly failed and/or neglected to comply with. The 1st Plaintiff further deposed that it was later discovered that the 1st Defendant was in the process of illegally disposing of certain parcels of land belonging to the Trust, namely, Plot No.s 36/1/156, 36/1/157 and 36/1/158 situated in Section 1, Eastleigh area in Nairobi. That it is therefore apparent from his conduct that the 1st Defendant is acting in blatant disregard and disobedience of the decree issued by this court and for which he ought to be held to account.
11. Despite being duly served, the 1st Defendant neither filed a response to the second motion nor attended the court for the motion on 20.03.2024 when, directions were issued for the disposal of the first and second motions, and the matter stood over to 29.04.2024. Instead, the 1st Defendant proceeded subsequently to file an application dated 28.03.2024 (the third motion) under certificate of urgency. Seeking inter alia, leave to lodge an appeal out of time, stay of execution of, varying or setting aside of the judgment herein pending the determination of the motion and the intended appeal (sic). The court declined to certify the third motion urgent instead directing that it be served for directions on 29.04.2024. On that date, none of the Defendants including the applicant in the third motion was in attendance and the court, stood over the issuance of directions in respect of the third motion to 27.06.2024, the date reserved for ruling in respect of the first and second motions. By the time of preparing this ruling, no submissions had been filed on behalf of the 1st Defendant in respect of the second Motion.
12. As directed, the first and second Motions were canvassed via written submissions. Submitting in support of the first Motion, counsel for the Intended Interested Party upon restating the averments in the respective affidavits sworn by his client, argued in sum that the Intended Interested Party having shown that he is a necessary party to the proceedings, it was in the interest of justice for the orders sought therein to be collectively granted. Counsel anchoring his submissions on the decisions rendered in *IMK v MWM & another* [2015] eKLR; *Jeremiah Mghanga Msafari v Millicent Zighe Mwachala & 3 others* [2021] eKLR; and *Mwai Kibaki & another v Mathingira Wholesalers Company Limited & 6 others* [2018] eKLR.
13. In opposing the first Motion, counsel for the Plaintiffs cited the decision in *Lilian Wairimu Ngatho & another v Moki Savings Co-Operative Society Limited & another* [2014] eKLR where the court held that pursuant to the provisions of Order 1 Rule 10(2) of the Civil Procedure Rules (CPR), an application for joinder could be made at any time, but only during pendency of a suit, and not subsequent to the conclusion of the suit. That in the present case, the court has already effectively adjudicated over the dispute presented in the suit by pronouncing its judgment and hence the first Motion has been brought too late in the day.
14. Counsel proceeded to argue that in any event, the Intended Interested Party claimed to be an official of the Society, which Society is an entity distinct from the Trust. Asserting further that the judgment in no way affects the Intended Interested Party since no orders have been made



against him. Counsel maintained that the Intended Interested Party does not hold any position in the Trust and hence the orders sought ought not to be granted. On those grounds, the court was urged to dismiss the first Motion, with costs.

15. Regarding the second Motion, counsel for the Plaintiffs supported his submissions upon the decision in *Teachers Service Commission v Kenya National Union of Teachers & 2 others* [2013] eKLR as well as the definition of contempt of court in Black's Law Dictionary (Ninth Edition). Counsel also relied on the decision in *Shimmers Plaza Limited v National Bank of Kenya Limited* [2013] eKLR where the Court of Appeal underscored the principle that court orders ought to be obeyed and adhered to. The Plaintiffs' counsel asserting that the application was one founded on civil contempt relied on the cases of *Cecil Miller v Jackson Njeru & Another* [2017] eKLR and *North Tetu Farmers Co. Ltd v Joseph Nderitu Wanjohi* [2016] eKLR where the respective courts set out the relevant ingredients to be proved.
16. In addressing these ingredients, counsel submitted that in the present instance, it had been established that the 1st Defendant despite having been made aware of the judgment delivered by this court on 6th April, 2023, willfully neglected to comply with the orders directed against him. That in the premises, he ought to be held in contempt of the decree arising from the said judgment. Counsel therefore pleaded with the court to allow the second Motion as prayed.
17. As earlier indicated, neither the 1st Defendant who is the subject of the contempt application, nor Susan Njeru, Isaya Nyabera and Registrar of Documents (hereafter the 2nd, 3rd and 4th Defendants respectively) filed any documents in respect of the respective Motions or participate in the hearing thereof. All despite evidence of service of the first Motion upon their advocate. As demonstrated in the two affidavits of service sworn by process server, Ngundo Mulevu on 19th October, 2023 and 13th March, 2024 respectively and the affidavit of service sworn by process server Isaya Lemer keto on 7th November, 2023, evidencing service of the second Motion.
18. The court has considered the affidavit material and submissions made in respect of the first and second Motions. Before delving into the merits thereof, it is apposite to address a pertinent issue raised by the Intended Interested Party through his further supplementary affidavit. Regarding the demise of the 2nd Plaintiff, a fact which was not previously brought to the attention of the court. Reviewing the documents exhibited in the said affidavit, the court observed that the Intended Interested Party annexed a copy of the death and funeral announcement dated 4th May 2022 apparently carried in the Standard Newspaper (marked "JMN1") to support his assertion that the 2nd Plaintiff died on an undisclosed date in 2022. In the absence of evidence to the contrary, it would seem that at the time of delivery of the judgment herein a year later, the said Plaintiff was deceased. This is a matter which ought to have been disclosed to the court, at the earliest opportunity. In the premises, the suit as relates to the 2nd Plaintiff would have been deemed to have abated as the cause of action was not one that would have survived the said Plaintiff.
19. That notwithstanding, the court will begin by addressing the first Motion. As earlier mentioned, the said Motion contains a myriad of prayers. However, it is noteworthy that prayer 3) seeking to vary and/or set aside the judgment delivered on 6th April, 2023 at the interim stage while being evidently incompetent is spent. The remaining substantive prayers are for the joinder of the Intended Interested Party in the suit after judgment; and upon granting such joinder, leave to appeal out of time and stay of execution of the judgment herein, pending the



hearing and determination of the intended appeal. The court will deal with the foremost prayer for joinder upon which, in the court's view, the other prayers will stand or fall.

20. The grant or refusal of an application for joinder involves the exercise of a discretion. However, such discretion must be exercised judicially and upon reason, rather than arbitrarily or capriciously. The term 'interested party' is defined in *Black's Law Dictionary*, 9th Edition, at pg. 1232 as: -

“A party who has a recognizable stake (and therefore standing) in a matter”.

21. The term is also defined in Rule 2 of the *Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules*, 2013 but not by the *Civil Procedure Act* and *Rules* made thereunder. *The Court of Appeal Rules*, 2022 define an interested party as:

“a person or entity that has an identifiable stake, legal interest or duty in the proceedings before the Court but is not a party to the proceedings or may not be directly involved in the litigation but has been allowed by the Court upon application, to appear as an interested party to address it in respect of a matter of law or fact.”

22. The above echoing the definition by the Supreme Court of Kenya in the case of *Attorney General v David Ndi & 73 Others* (Petition 12 (EO16) of 2020) [2021] KESC 17 (KLR), which decision offered guidance on the applicable principles in an application of joinder by an interested party. Reiterating its earlier decisions touching on the question, the Court stated that: -

“An Applicant to be enjoined as an Interested Party has to satisfy this Court that it has met the legal requirements for joinder.....

This court has laid down the guiding principles applicable in determining an application to be enjoined as an interested party in *Trusted Society of Human Rights Alliance v Mumo Matemu & 5 Others SC Petition (Application)* No. 12 of 2013. The principles were affirmed in the case of *Francis Kariuki Muruatetu & another v Republic & 5 others (supra)* where the court stated:

“... One must move the Court by way of a formal application. Enjoinment is not as of right, but is at the discretion of the court; hence, sufficient grounds must be laid before the court, on the basis of the following elements:

- (i) The personal interest or stake that the party has in the matter must be set out in the application. The interest must be clearly identifiable and must be proximate enough, to stand apart from anything that is merely peripheral.
- (ii) The prejudice to be suffered by the intended interested party in case of non-joinder, must also be demonstrated to the satisfaction of the Court. It must also be clearly outlined and not something remote.
- (iii) Lastly, a party must, in its application, set out the case and/or submissions it intends to make before the Court, and demonstrate the relevance of those submissions. It should also demonstrate that these



submissions are not merely a replication of what the other parties will be making before the court” (Emphasis Added).

23. Applying the foregoing principles to the second Motion now before the court, the chief contention by the Intended Interested Party’s is that he has a legal stake in the proceedings by virtue of being a trustee in the Trust at all material times, but was neither made a party to the suit nor made aware of its existence prior to the judgment. Secondly, that he intends to ventilate his grievances regarding the outcome thereof, on appeal. The retort by the 1st Plaintiff both on his behalf and on behalf of the remaining Plaintiffs, is that the said Proposed Interested Party is not a trustee of the Trust, having ceased to hold such position in the Trust since 9th December 2017 when he was removed, and secondly that proceedings herein having been conclusively determined by way of a judgment it is too late for the Intended Interested Party to seek to be enjoined. Moreover, that the Intended Interested Party’s allegation that he served as the Assistant Secretary to the Society at material times, in no way entitles him to be a party to the suit since the Society and the Trust comprise two (2) distinct entities.

24. A relevant provision addressing the joinder of parties, but not interested parties expressly, is Order 1, Rule 10(2) of the [CPR](#) which provides as follows:

“The court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the court to be just, order that the name of any party improperly joined, whether as plaintiff or defendant, be struck out, and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all questions involved in the suit, be added.”

25. The Court of Appeal in [JMK v MWM & another](#) [2015] eKLR when it succinctly stated the following:

“Order 1 Rule (10) (2) of the [Civil Procedure Rules](#) empowers the court, at any stage of the proceedings, upon application by either party or suo motu, to order the name of a person who ought to have been joined or whose presence before the court is necessary to enable the court effectually and completely adjudicate upon and settle all questions involved in the suit, to be added as a party. Commenting on this provision, the learned authors of [Sarkar’s Code of Civil Procedure](#) (11th Ed. Reprint, 2011, Vol. 1 P. 887), state that:

“The section should be interpreted liberally and widely and should not be restricted merely to the parties involved in the suit, but all persons necessary for a complete adjudication should be made parties.”

This Court adopted the same approach in *Central Kenya Ltd. V. Trust Bank & 4 Others*, Ca No. 222 OF 1998, when it affirmed that the guiding principle in amendment of pleadings and joinder of parties is that:

“all amendments should be freely allowed and at any stage of the proceedings, provided that the amendment or joinder as the case may be, will not result in prejudice or injustice to the other party which cannot properly be compensated for in costs.”

We would however agree with the respondent that Order 1 Rule (10)(2) contemplates an application for amendment or joinder of parties where proceedings are still pending before the Court. Sarkar’s Code, (*supra*) quoting as authority,



decisions of Indian Courts on the provision, expresses the view that an application for joinder of parties can be filed only in pending proceedings. In the same vein, the Court of Appeal of Tanzania, while considering the equivalent of Order 1 Rule 10(2) of our *Civil Procedure Rules*, in *Tang Gas Distributors Ltd v Said & Others*[2014] EA 448, stated that the power of the court to add a party to proceedings can be exercised at any stage of the proceedings; that a party can be joined even without applying; that the joinder may be done either before, or during the trial; that it can be done even after judgment where damages are yet to be assessed; that it is only when a suit or proceeding has been finally disposed of and there is nothing more to be done that the rule becomes inapplicable; and that a party can even be added at the appellate stage.”

26. Starting with the question of the timing of the first Motion, the Court notes that the proceedings before it have terminated, and all issues arising between the primary parties determined by the judgment of this court delivered over a year ago. In other words, the suit herein is no longer pending adjudication before this court. The expressed intentions of the Intended Interested Party in seeking joinder is to acquire “locus standi” to challenge the judgment of this court on appeal, with leave. Before this court there is evidently no existing appeal or such related proceedings existing. The Intended Interested Party is therefore seeking to take over the concluded matter from the primary parties who, so far as the record shows, have not preferred an appeal, so as to challenge the judgment of this court via his own appeal.
27. In the case of *Francis Karioko Muruatetu & Another v Republic & 5 others* [2016] eKLR the Supreme Court spelt out the respective positions of parties in a suit where an interested party had been enjoined or is seeking to be enjoined: -

“[41]...We are of the opinion that any party seeking to join proceedings in any capacity, must come to terms with the fact that the overriding interest or stake in any matter is that of the primary/principal parties’ before the Court. The determination of any matter will always have a direct effect on the primary/principal parties. Third parties admitted as interested parties may only be remotely or indirectly affected, but the primary impact is on the parties that first moved the Court. This is true, more so, in proceedings that were not commenced as Public Interest Litigation (PIL), like the proceedings now before us”

28. The Supreme Court further exhorted that the joinder or proposed joinder of an interested party should neither involve nor entitle such a party to raise new issues or cause of action not already pleaded by the primary parties in the suit, before proceeding to state that:

(42) ...One of the principles for admission of an interested party is that such a party must demonstrate that he/she has a stake in the matter before the Court. That stake cannot take the form of an altogether new issue to be introduced before the Court”
(Emphasis added).

See also *Kenya Medical Laboratory Technicians and Technologists Board & 6 Others v Attorney General & 4 Others* [2017] eKLR.

29. It is the considered view of the court that the suit before this court having been concluded, the Intended Interested Party has approached the court too late in the day. And that given his admitted past association with the Society and Trust, it defies belief that for the six years during which this dispute involving the leadership wrangles in the two organizations was pending, the



said Applicant was unaware of it. His expressed intention to essentially supplant the primary parties and to give a new lease of life to the dispute by way of appeal portends a situation where he steps into the shoes of the primary parties. With respect, this would amount to operating outside the scope of participation envisaged in respect of an interested party and appears untenable.

30. Has the Intended Interested Party demonstrated that he has a legal stake in the matter, to warrant his joinder to enable him to challenge the judgment on appeal? The Intended Interested Party asserted that he was at all material times and at present a trustee of the Trust. However, he did not tender any credible evidence to support such averment. What was exhibited in his supporting affidavit as “JMN 1” was a letter dated 6th July, 2016 from the Office of the Registrar of Societies, listing him as the Assistant Secretary of the Society. The relationship and distinction between the Trust and the Society was ventilated before the court and addressed in the judgment.
31. In any event, the 1st Plaintiff’s affidavit exhibited the annexure marked “MN 1”, being an extract of the minutes pertaining to the special general meeting held on 9th December, 2017 resolving to remove various persons from membership of the Society, and therefore the Trust, including the Intended Interested Party. Also annexed were letters dated 1st March, 2018 and 12th April, 2019 issued by the Registrar of Societies, and listing the relevant office bearers of the Society. The Intended Interested Party’s name does not appear therein.
32. In the court’s view, therefore, the Proposed Interested Party has failed to delineate his personal or legal stake in the proceedings. Moreso at this advanced stage. Surely, given his past association with the Trust and Society the Proposed Interested Party cannot convincingly pretend to have been unaware of the outcome of the asserted special general meeting of 9th December 2017, and the existence of this suit prior to his application. The court is not persuaded and must question why he did not challenge that outcome, or apply earlier to be enjoined in the suit, but instead, waiting for over six years to approach the court. The delay, as reckoned from 2017 rather than the judgment of this court is as inordinate as it is inexplicable. The late action appears in the circumstances to be an afterthought, now camouflaged under a specious garb of ignorance of significant events. A party seeking the exercise of the court’s discretion in his favour must demonstrate more candour and good faith.
33. Moreover, the judgment delivered by this court on 6th April, 2023 contains no adverse findings or orders directed against or in relation to the Proposed Intended Interested Party. Where is the prejudice likely to be suffered by the Proposed Interested Party? Given the stage of the proceedings it appears doubtful that his joinder would, beyond merely prolonging the dispute, bring a perspective or contribution distinct from the input already made by the primary parties. As rightly pointed out by the Plaintiffs, the Proposed Interested Party did not exhibit a draft of his intended memorandum of appeal in this regard.
34. In the circumstances, the prayer for joinder must fail, and with it, the remaining prayers seeking leave to appeal out of time and to stay execution pending the intended appeal. The first Motion is therefore dismissed with costs.
35. Moving on to the second Motion, it is evidently unopposed. The Motion seeks several orders as earlier outlined. The Plaintiffs’ chief contention being that the 1st Defendant is in contempt of the judgment delivered on 6th April, 2023 and resultant decree. The 1st, 3rd and 4th Plaintiffs have asserted that the 1st Defendant despite being aware of the existence of the judgment and



resultant orders issued against him, and being at all material times represented by counsel, has deliberately failed to release the items listed in prayer (3) of the second Motion.

36. Having heard the dispute herein, this court gave judgment in favour of the Plaintiffs, and concluded as follows:

“...I am satisfied that the Plaintiffs are entitled to the following orders which are hereby granted:

- a. A permanent prohibitory injunction restraining the 1st and 2nd Defendants from acting as and/or purporting to act as the Trustees of the Trust herein.
- b. An order directing the 1st and 2nd Defendants to vacate office with immediate effect and to hand over all official documents, seal of the Trust and the office to the Plaintiffs herein being the newly elected Trustees of the Trust pursuant to the election of the international office of the Trust.
- c. An order directing the 1st and 2nd Defendants to hand over the original Certificate of Incorporation and the Official Seal of the Trust forthwith to the Plaintiffs.
- d. An order directing the 4th Defendant to forthwith certify and register the appointment of the 1st, 2nd, 3rd and 4th Plaintiffs as the new and only Trustees of the Trust...”

37. There is ample and uncontroverted evidence on record showing that the 1st Defendant has been served with the judgment and extracted decree but has not complied therewith. Upon being served with this Motion, the 1st Defendant opted to file the third Motion seeking the orders set out earlier in this ruling, but did not file a response to the second Motion.

38. The Court of Appeal in *Christine Wangari Gachege v Elizabeth Wanjiru Evans & 11 Others* [2014] eKLR held that the procedure applicable in England under Part 81 of the English Civil Procedure (Amendment No.2) Rules of 2012 regarding contempt of court applied in Kenya, pursuant to section 5(1) of the *Judicature Act* which 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 that power shall extend to upholding the authority and dignity of subordinate courts...”

39. The term ‘contempt’ is defined in the *Black’s Law Dictionary* 9th edition as follows:

“a disregard of, or disobedience to, the rules or orders of a legislative or judicial body, or an interruption of its proceedings by disorderly behavior or insolent language, in its presence or so near thereto as to disturb the proceedings or to impair the respect due to such a body.”



40. *Black's Law Dictionary* (*supra*) further defines contempt of court to be :
- “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.”
41. In Christine Wangari Gachege’s case (*supra*), the court held that in punishing contempt, the court exercises ordinary criminal jurisdiction. In *Stewart Robertson v Her Majesty’s Advocate*, 2007 HCAC 63 it was held that:
- “Contempt of court is constituted by conduct that denotes willful defiance of or disrespect towards the court or that willfully challenges or affronts the authority of the court or the supremacy of the law, whether in civil or criminal proceedings.”
42. The Supreme Court of Kenya in *Republic v Ahmad Abolfathi Mohammed & Another* [2018] e KLR discussed the issue of contempt of court at length. The Court observed that:
- “(24) In *Econet Wireless Kenya Ltd v. Minister for Information & Communication of Kenya & Another* [2005] 1 KLR 828 Ibrahim J (as he then was) relied on the Court of Appeal decision in *Gulabchand Popatlal Shah & Another Civil Application No. 39 of 1990* (unreported), where the Court of Appeal stated as follows:
- “It is essential for the maintenance of the Rule of Law and order that the authority and the 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 responsibility to deal firmly with proved contemnors... In *Hadkinson V. Hadkinson*(1952) 2 All E.R. 567, it was held that:
- It is the plain and unqualified obligation of every person against or in respect of whom an order is made by a Court of competent jurisdiction, to obey it unless and until that 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 an order believes it to be irregular or void.”...
- (26) The Court of Appeal in *A.B. & Another v R.B.*, Civil Application No. 4 of 2016 [2016] eKLR cited with approval the Constitutional Court of South Africa’s decision in *Burchell v. Burchell*, Case No.364 of 2005 where it was held:
- “Compliance with court orders is an issue of fundamental concern for a society that seeks to base itself on the rule of law. *The Constitution* states that the rule of law and supremacy of *the Constitution* are foundational values of our society. It vests the judicial authority of the state in the court and requires other organs of the state to assist and protect the court. It gives everyone the right to have legal disputes resolved in the courts or other independent and impartial tribunals. Failure to enforce court orders effectively have the potential



to undermine confidence in recourse to law as an instrument to resolve civil disputes and may thus impact negatively on the rule of law.”...

- (28) It is, therefore, evident that not only do contemnors demean the integrity and authority of Courts, but they also deride the rule of law. This must not be allowed to happen. We are also conscious of the standard of proof in contempt matters. 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.”

See also the decisions of the Court of Appeal in *Refrigerator & Kitchen Utensils Ltd v Gulabchand Popatlal Shah & Others* Civil Appeal Nairobi 39/1990 and in *Wildlife Lodges Ltd v County Council of Nairobi & Another* [2005] EA 344 .

43. The Supreme Court in *Republic v Ahmad Abolfathi Mohammed* (supra) proceeded to explain the rationale for the high standard of proof in contempt applications as follows:

“(29) 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. [Emphasis added]

- (30) The question that begs an answer, thus, is: did the applicant willfully disobey this Court’s Orders?”

44. The two related ingredients of willful disobedience and knowledge of the order are critical in a successful contempt proceeding. In the past, it was held by superior courts that for an applicant to succeed in contempt proceedings, he must prove personal service of the subject orders and the attendant penal notice upon the alleged contemnor. See the Court of Appeal dicta in *Nyamogo & Another v Kenya Posts and Telecommunications Corporation* [1994] KLR 141. In recent years however, the courts have stated that where the applicant is able to demonstrate awareness by such alleged contemnor of the orders and not necessarily personal service of the order upon the contemnor, such awareness is sufficient. See *Kenya Tea Growers Association v Francis Atwoli & Others* [2012] eKLR.

45. Here it is not contested that this court vide the judgment delivered on 6th April, 2023 granted the Plaintiffs various reliefs against the Defendants. Among these were orders requiring the 1st



and 2nd Defendants to hand over all relevant official documents relating to the Trust. These orders are clear and unambiguous.

46. Secondly, the 1st Defendant is aware of the terms of the judgment through service through his counsel. Further, there is on record an affidavit of service sworn by process server Lemerketo Isaya on 9th October, 2023 attached to the second Motion, indicating that service of the resultant decree issued herein on 6th July, 2023, and accompanied by a letter dated 29th September, 2023, was effected upon the 1st Defendant on 6th October, 2023 in Eastleigh area in Nairobi. The contents of the said affidavit of service were in no way challenged by the 1st Defendant or any of his counterparts. That being the position, the court is satisfied that the 1st Defendant was notified of the terms of the judgment and decree and therefore had knowledge thereof. The fact concerning knowledge of the orders of the court is to my mind also confirmed by the action taken by the 1st Defendant in filing the third Motion.
47. The assertions by the Applicants in the second Motion that the 1st Defendant has willfully failed, neglected or refused to comply with the orders of the court are not controverted. The refusal to comply and failure to explain his non-compliance with the orders of the court irresistibly points to willful disobedience on the part of the 1st Defendant, who is hereby found to be in contempt of the orders of this court.
48. The court will therefore make the following orders:-
 1. The court grants prayers (4) and (6) of the second Motion dated 26th October 2023 in terms that:
 - a. A notice to show cause be and is hereby issued against the 1st Defendant (John Ndar), the contemnor, to appear in person, on the date hereafter appointed, to show cause why he should not be punished for contempt of court in respect of the decree issued by this Court on the 6th July, 2023, arising from the judgment delivered on 6th April, 2023.
 - b. The 1st, 3rd and 4th Plaintiffs shall have the costs of the Notice of Motion dated 26th October 2023, which will be borne by the 1st Defendant.
 2. The first Notice of Motion dated 8th September 2023 is hereby dismissed with costs to the 1st, 3rd and 4th Plaintiffs.
 3. The suit in relation to the 2nd Plaintiff is deemed to have abated and the judgment of this court accordingly rectified.

DELIVERED AND SIGNED ELECTRONICALLY AT NAIROBI ON THIS 27TH DAY OF JUNE 2024.

C.MEOLI

JUDGE

In the presence of:

For the 1st, 3rd and 4th Plaintiffs: N/A

For the 1st Defendant: Ms. Onyiego

For the Proposed Interested Party: Mr. Kariuki

C/A: Erick

