



**Hassan & 2 others (Suing on their behalf and on behalf of Uchuzi Court Residents Welfare Association) v Director-General, National Environment Management Authority & another (Tribunal Appeal 13 of 2023) [2023] KENET 483 (KLR) (1 September 2023) (Ruling)**

Neutral citation: [2023] KENET 483 (KLR)

**REPUBLIC OF KENYA  
IN THE NATIONAL ENVIRONMENT TRIBUNAL - NAIROBI  
TRIBUNAL APPEAL 13 OF 2023**

**EMMANUEL MUMIA, CHAIR, WINNIE TSUMA, VICE CHAIR, KARIUKI  
MUIGUA, DUNCAN KURIA & RONALD ALLAMANO, MEMBERS**

**SEPTEMBER 1, 2023**

**BETWEEN**

**AFIFA ISMAIL HASSAN ..... 1<sup>ST</sup> APPELLANT  
JOHN MWABILI HANNIGTON ..... 2<sup>ND</sup> APPELLANT  
NAOMI NYAMBURA NDONGA ..... 3<sup>RD</sup> APPELLANT  
SUING ON THEIR BEHALF AND ON BEHALF OF UCHUZI COURT  
RESIDENTS WELFARE ASSOCIATION**

**AND**

**DIRECTOR-GENERAL, NATIONAL ENVIRONMENT MANAGEMENT  
AUTHORITY ..... 1<sup>ST</sup> RESPONDENT  
AL BAYT PROPERTIES LIMITED T/A AL BAYT PROPERTIES  
HOTEL ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

**Background**

1. Before the Honorable Tribunal is the Appellants' Application dated 11<sup>th</sup> May 2023 which is supported by the affidavit of John Mwabili Hannigton sworn on even date. The said Application is seeking the following orders:
  1. Spent
  2. Spent



3. That this Honorable Tribunal be pleased to find Engineer Momo Boru Mamo, the Director General of the 1<sup>st</sup> Respondent and Abdikhani Ali Aden, the directors of Suab Construction Company Limited, Suleiman Farah Malim and Abdirizak Hussein Sheik who are the Directors of the 2<sup>nd</sup> Respondent and Ibrahim Ali Aden who is the project manager of the den who is the project manager of the 2<sup>nd</sup> Respondent respectively in contempt of this Honorable Tribunal for disobedience of its directions dated April 3, 2023 and section 129(4) of [EMCA](#).
  4. That upon grant of prayer(2) above, this Honourable Tribunal be pleased to impose the penalty of a hefty fine on Engineer Momo Boru Mamo, the Director General of the 1<sup>st</sup> Respondent and Abdikhani Ali Aden, the directors of Suab Construction Company Limited, Suleiman Farah Malim and Abdirizak Hussein Sheik who are the Directors of the 2<sup>nd</sup> Respondent and Ibrahim Ali Aden who is the project manager of the den who is the project manager of the 2<sup>nd</sup> Respondent in execution of this directions to satisfy the penalty for contempt.
  5. That upon grant of prayer(3) above, this Honourable Tribunal do issue an order that the said Engineer Momo Boru Mamo, the Director General of the 1<sup>st</sup> Respondent and Abdikhani Ali Aden, the directors of Suab Construction Company Limited, Suleiman Farah Malim and Abdirizak Hussein Sheik who are the Directors of the 2<sup>nd</sup> Respondent and Ibrahim Ali Aden who is the project manager of the den who is the project manager of the 2<sup>nd</sup> Respondent be committed to civil jail for a period of 6 months for the disobedience of the Tribunal directions dated 3<sup>rd</sup> April 2023 and Section 129(4) of [EMCA](#).
  6. That the said ccontemnors, Engineer Momo Boru Mamo, the Director General of the 1<sup>st</sup> Respondent and Abdikhani Ali Aden, the directors of Suab Construction Company Limited, Suleiman Farah Malim and Abdirizak Hussein Sheik who are the Directors of the 2<sup>nd</sup> Respondent and Ibrahim Ali Aden who is the project manager of the den who is the project manager of the 2<sup>nd</sup> Respondent herein do personally meet the costs of this Application.
  7. Any other deemed expedient in the circumstances.
2. The Application did not go unopposed, and the 2<sup>nd</sup> Respondent in that regard filed Grounds of Opposition dated May 26, 2023 and Replying Affidavit sworn by Abdikhani Ali Aden on August 8, 2023.

### **Issues For Determination**

3. Having considered the Appellants' Application together with the supporting affidavit thereto, the 2<sup>nd</sup> Respondent's Grounds of Opposition and Replying Affidavit together with all the documents filed by parties, it is our view that the only issue that arises for determination is whether the Appellants are entitled to the orders sought.

### **Whether the Appellants are entitled to the orders sought**

4. We note that the Appellants are principally seeking that the Honorable Tribunal finds the 1<sup>st</sup> Respondent and the directors of the 2<sup>nd</sup> Respondent and its project manager in contempt of the tribunal and commit them to civil jail for a period of 6 months for the disobedience of the Tribunal directions dated 3<sup>rd</sup> April 2023 and section 129(4) of [EMCA](#).



5. According to the [\*Black's Law Dictionary\*](#):

‘Contempt is a disregard of, 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.’
6. Further, in *Hadkinson v Hadkinson* (1952) 2 All ER. 567, it was held that: It is plain and unqualified obligation of every person against or in respect of, who 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 even void.”
7. The principles governing grant of contempt orders are now well settled. As stated in the case of [\*Samuel M. N. Mweru & others v National Land Commission & 2 others\*](#) [2020] eKLR:

‘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’
8. Writing on proving the elements of civil contempt, learned authors of the book *Contempt in Modern New Zealand* have authoritatively stated as follows:

‘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.’
9. On the first element, we note that on April 3, 2023, the Honourable Tribunal gave directions on how to proceed and drew parties’ attention to the provisions of Section 129(4) of [\*EMCA\*](#). The said provision states as follows;

‘Upon any appeal to the Tribunal under this section, the status quo of any matter or activity, which is the subject of the appeal, shall be maintained until the appeal is determined;
10. Our interpretation of the above provision is that the same confers an automatic status quo order once an appeal is filed at the tribunal. As such, once the appeal was filed and directions of April 3, 2023 issued, parties were supposed to maintain the status quo then obtaining, and in particular stop the



construction or any other activity on the suit property. It is therefore our finding the terms of the orders were clear, unambiguous and binding on the parties herein.

11. Of course, we note the sentiments by the 2<sup>nd</sup> Respondent that section 129(4) of [EMCA](#) was amended. The effect of the amendment of was to do away with the automatic status quo order. However, the High Court sitting at Nairobi in Petition Number 268/2018 and Petition Number 361/2028 issued conservatory orders suspending the amendments. No party herein has provided any evidence to show that the said conservatory orders were lifted.
12. On the 2<sup>nd</sup> element, we note that the Respondents' advocates were duly served with tribunal's directions/orders. The Appellants' have annexed an affidavit of service to that effect. Since the Respondent's advocates were served with the said orders, there is a presumption, which is not unfounded, that they must have informed their clients and hence it can be deduced that the Respondents had knowledge of the orders. This was the holding of Court of Appeal in [Shimmers Plaza Limited v National Bank of Kenya Limited](#), [2015] eKLR, where the Court held that the knowledge of the court order by the advocate of the alleged contemnor is sufficient for the purposes of contempt proceedings. The Court stated as follows:

‘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.’

13. It is therefore our finding that the Respondents had knowledge and/or proper notice of the orders. In any event, the Respondents have not denied that they were aware of the said orders.
14. On the 3<sup>rd</sup> element, we note that in its Replying Affidavit, the 2<sup>nd</sup> Respondent has admitted that they continued with construction until they were issued with a stop order by the 1<sup>st</sup> Respondent on 2<sup>nd</sup> August 2023. In essence they have admitted that they acted in breach of the tribunal orders from the time they were issued on 3<sup>rd</sup> April 2023 upto 2<sup>nd</sup> August 2023. With regards, to the 1<sup>st</sup> Respondent, the Appellants have not shown how he acted in breach of the tribunal orders.
15. On the fourth and final element, whereas the 2<sup>nd</sup> Respondent acted in breach of the tribunal orders, it is our view that the same was not deliberate. In its Replying Affidavit, the 2<sup>nd</sup> Respondent has explained at length that they thought that the 2018 amendments which dispensed with the automatic status quo orders were operational. Of importance to note, is that once, they were issued with a stop order by the 1<sup>st</sup> Respondent, the 2<sup>nd</sup> Respondent stopped any further construction on the site. No evidence has been provided to show that the construction is still ongoing. It is thus our finding that the 2<sup>nd</sup> Respondent did not deliberately act in breach of the tribunal orders.
16. For one to be found guilty of contempt, it must be shown that their conduct was deliberate and intentional. This was the holding of Mativo J. (as he then was) in the case of [Samuel M. N. Mweru & Others v National Land Commission & 2 others](#)(*supra*), where the Learned Judge held as follows:

‘accidental or unintentional disobedience is not sufficient to justify one for holding guilty of contempt. It is further relevant to bear in mind the settled law on the law of contempt that casual or accidental or unintentional acts of disobedience under the circumstances which



negate any suggestion of contumacy, would amount to a contempt in theory only and does not render the contemnor liable to punishment.’

17. Be that as it may, we note that apart from the 1<sup>st</sup> Respondent, the other parties sought to be cited for contempt are not parties to this suit. They are described as directors and project manager of the 2<sup>nd</sup> Respondent. The 2<sup>nd</sup> Respondent is a limited liability company. It is an elementary principle of company law that a company is a separate legal entity, and the corporate veil has to be lifted for a director or an officer of the company to be held personally liable for the acts or omissions of the company.
18. The Appellants did not apply to cite the 2<sup>nd</sup> Respondent for contempt nor did they seek to pierce the corporate veil. It therefore follows that the orders seeking to cite the 2<sup>nd</sup> Respondent’s directors and officers for contempt are legally untenable. Our finding is informed by the holding of the Court in *Katsuri Limited v Kapurchand Depar Shah* [2016] eKLR, where it was held as follows:

‘The other important aspect to mention is that the alleged contemnor is a director of the company. He is not a party to these proceedings in his personal capacity. The company is a legal entity. The proper procedure for the applicant was first to apply to lift the corporate veil then go for the directors in their personal capacities. As matters stand now, the director is not personally liable for debts, actions or omissions of the company, hence the application before me is misdirected.’
19. The above position was upheld by the Court of Appeal in the case of *Geoffrey Kathuri Kison & 10 others v East African Portland Cement Co. Ltd & 5 others* [2021] eKLR, where the Appellate Court observed as follows:

‘It follows therefore that failure by the applicants to cite the 1<sup>st</sup> respondent for contempt and to lift the corporate veil of the 1<sup>st</sup> respondent denied them the chance to cite the 2<sup>nd</sup> to 6<sup>th</sup> respondents for contempt as directors or accounting officers of the 1<sup>st</sup> respondent’
20. In view of the above analysis and findings, the conclusion becomes irresistible that the appellants’ notice of motion application dated May 11, 2023 does not satisfy the prerequisites for the Tribunal to grant the orders sought. Accordingly, we dismiss the said Application with no orders as to costs.

## Orders

21. The Appellants’ Notice of Motion Application dated 11<sup>th</sup> May 2023 is hereby dismissed with no orders as to costs.

**DATED AT NAIROBI THIS 1<sup>ST</sup> DAY OF SEPTEMBER 2023**

**EMMANUEL MUMIA.....CHAIRMAN**

**WINNIE Tsuma.....VICE-CHAIR**

**KARIUKI MUIGUA.....MEMBER**

**DUNCAN KURIA.....MEMBER**

**RONALD ALLAMANO.....MEMBER**

