



Kioko ((Suing in his capacity as Chairman for and on behalf of Runda Gardens Residents' Association)) v National Environment Management Authority & 4 others (Tribunal Appeal 18 of 2021) [2023] KENET 1377 (KLR) (10 January 2023) (Ruling)

Neutral citation: [2023] KENET 1377 (KLR)

REPUBLIC OF KENYA
IN THE NATIONAL ENVIRONMENT TRIBUNAL - NAIROBI
TRIBUNAL APPEAL 18 OF 2021
EMMANUEL MUMIA, CHAIR, WINNIE TSUMA, VICE CHAIR, KARIUKI
MUIGUA, DUNCAN KURIA & RONALD ALLAMANO, MEMBERS
JANUARY 10, 2023

BETWEEN

VINCENT KIOKO APPELLANT
(SUING IN HIS CAPACITY AS CHAIRMAN FOR AND ON BEHALF OF
RUNDA GARDENS RESIDENTS' ASSOCIATION)

AND

THE NATIONAL ENVIRONMENT MANAGEMENT
AUTHORITY RESPONDENT

AND

REGISTERED TRUSTEES OF FOUNTAIN GATE CHURCH. 1ST CONTEMNOR
JAMES MBUGUA 2ND CONTEMNOR
PHILIP G KIMANI 3RD CONTEMNOR
DIRECTORS, DUGBAAB DEVELOPERS LIMITED AKA UGBAAB
DEVELOPERS LIMITED 4TH CONTEMNOR

RULING

1. The Appellant filed the Notice of motion application dated 13th September 2021 and sought orders to:
 - a. Spent
 - b. That pending the inter parties hearing and determination of the instant application, this Honourable Tribunal be and is hereby pleased to issue summons requiring the personal attendance of the 1st to 4th Contemnors, on a date and time to be determined by this



Honourable Tribunal; for them to jointly and severally show why they should not be cited and punished for their wilful and deliberate disobedience of the order of the Honourable tribunal of 2nd September 2021, in contemptuously proceeding with construction work on the impugned project on Plot LR 27937 Runda, Nairobi.

- c. That pending the inter parties hearing and determination of the instant application the National Environment Management Authority (NEMA) as well as the ward commander/ Officer Commanding, Runda Police Station be and are hereby ordered to ensure immediate compliance with the injunctive order of 2nd September 2021 issued by the Hon Tribunal and enforce the same.
 - d. That in default of attendance upon issuance of summons, (under Order 2 herein) the Hon. Tribunal be and is hereby pleased to issue warrants of arrest, to be executed and enforced by the Ward Commander/ Officer Commanding, Runda Police Station.
 - e. That this Honorable Tribunal be and is hereby pleased to cite the 1st to 4th contemnors jointly and severally for contempt of the Hon Tribunal for their wilful and deliberate disobedience and defiance of the order of the Hon Tribunal of 2nd September 2021 in contemptuously proceeding with construction works on the impugned project on Plot LR 27937 Runda, Nairobi: and sentence them each to a custodial sentence of not less than One year, and each a monetary fine for the sum of not less than Kenya shillings two million for contempt of the Hon tribunal.
 - f. That the Honorable Court be pleased to issue any further orders and/or direction as may be necessary to give effect to the orders sought herein and that it deems fit in the interest of justice.
 - g. That costs of this application be provided for on a full indemnity basis.
2. The Application did not go unopposed, and the 2nd Respondent, in that regard, filed a replying affidavit sworn by Mr James Mbugua in his capacity as the overseer of the church of the 2nd Respondent.

Issues for determination

3. Having considered the Appellant's application together with the supporting affidavit and supplementary affidavit thereto, and the 2nd Respondent's Replying affidavit, it is our view that the only issue that arises for determination is whether the Appellants are entitled to the orders sought.
4. We note that the Appellant, in its application, is principally seeking that the 2nd respondent (1st to 4th Contemnors) be held in contempt for their wilful and deliberate disobedience and defiance of the order of the Honourable Tribunal of the 2nd September 2021. The Appellant is seeking to enforce the orders.
5. The 2nd respondent has denied that it was in disobedience of the orders. They argue that the mere existence of a signboard is not an indication that work is progressing on a project.
6. 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 behaviour 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.'
7. [Nigel Lowe and Brenda Sufrin, in the book The Law of Contempt](#), have stated as follows: "Coercive orders made by the courts should be obeyed, and undertakings formally given to the courts should be honoured unless and until they are set aside. Furthermore, it is generally no answer to an action for contempt that the order disobeyed or the undertaking broken should not have been made or accepted



in the first place. The proper course if it is sought to challenge the order or undertaking is to apply to have it set aside."

8. In *Halsbury's laws of England*, it is stated: It was the plain and unqualified obligation of every person against or in respect of whom an order was made by a court of competent jurisdiction to obey it unless and until it was discharged and disobedience of such an order would as a general rule result in the person disobeying it being in contempt and punishable by committal or attachmentan application to court by him not being entertained until he had purged his contempt"
9. The elements governing contempt are now well settled as stated in the High Court of South Africa which has been severally reiterated in Kenya: [*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), [*Samuel M. N. Mweru & Others v National Land Commission & 2 others*](#) [2020] eKLR. 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. 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.
10. On the first element, we note that on 2nd September 2021, the Honourable Tribunal gave an order of injunction enforcing the *status quo* and barring construction. The *Black's Law Dictionary* defines *status quo* as a Latin word which means the situation as it exists. The purpose of an order of *status quo* has been reiterated in several decisions. In the case of [*Republic v National Environment Tribunal, Ex-Parte Palm Homes Limited & Another*](#) [2013] eKLR, Odunga J stated:

"When a court of law orders or a statute ordains that the *status quo* be maintained, it is expected that the circumstances as at the time when the order is made or the statute takes effect must be maintained. An order maintaining the *status quo* is meant to preserve the existing state of affairs...*status quo* must therefore be interpreted with respect to existing factual scenario..."
11. On the 2nd element, the court of appeal in [*Shimmers Plaza Limited v National Bank of Kenya Limited*](#), [2015] eKLR held:

"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.' We note that the orders given were done in the presence of the 2nd Respondent's advocates. In the alternative, we also note that the Appellants through their letter dated 3rd and 9th September 2021 had informed them of the order.

12. On the 3rd element, the 2nd Respondent insists that the order in question has not been disobeyed. He denies that there has been any continued construction on the project site.
13. The tribunal noted that the Appellants through their affidavit state that the construction has continued despite the orders granted and in their supplementary affidavit para 7 stated "that we were constrained to lodge these contempt proceedings to restrain the undeterrable contempt which continued up to and including the 20th day of September 2021. I annex herewith true copies of the images of the contemptuous works, and certificate of e-evidence produced as marked VK-3'. At a glance, the Appellant's evidence shows construction workers on the site, and in the process of construction.
14. Further, the site appears to have ongoing construction work.
15. The 2nd Respondent through the replying affidavit stated as follows: That the fact that an injunctive order was issued did not restrain the 2nd Respondent or any of its agents from accessing the site. That the applicant has not produced evidence of service to the Directors of Ugbaab Developers Limited whom we had appointed as our contractors and they had erected a signboard on the site after we mutually terminated our contract with the previous contractor after we had agreed on a mutual termination following an arbitral process... that I have conducted a site visit to the site and established that the project is in the same state that it was in August 2021 when the Appeal was filed. Therefore, the allegations of contempt of court against the Respondent only amount to harassment.
16. The 2nd respondent also stated that the Applicants/Appellants relied on the existence of a signboard as an indication that construction work was going on. It is imperative to note that the Appellants filed a supplementary affidavit dated 24th September 2021 with other pictures of the site, whilst the 2nd respondent's replying affidavit is dated 29th October 2021. The 2nd Respondent did not respond or refer to the Supplementary Affidavit.
17. The fourth and final element is whether the 2nd respondent's conduct was deliberate. On record, there is evidence that the Appellants/Applicants wrote two letters dated 3rd September and 9th September to the 2nd respondents informing them of the disobedience to the tribunal's orders.
18. In the present circumstances, the tribunal has observed that the 2nd Respondent being the 1st to 3rd Contemnors have refused and or neglected to comply with the orders issued. The order remains a valid and legal order provided it has not been set aside, varied or appealed against.
19. We note that the 4th Contemnor is described as a director of the limited company. The 4th Contemnor is a limited liability company. A company is a separate legal entity, and the corporate veil has to be pierced for the director or an officer of the company to be held personally liable for the acts and or omissions of the company. It, therefore, follows that the orders seeking to cite the directors and officers for contempt are legally untenable. Our finding is from *Katsuri Limited v Kapurchand Depar Shah* [2016] eKLR which was reiterated in *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) "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."



Orders

20. The 1st to 3rd Contemnors failed to comply with the tribunal's orders of 2nd September 2021.
21. The 1st to 3rd Contemnors shall pay the Applicants Kshs 2,000,000 in 90 days to purge contempt of court orders of 2nd September 2021. The contempt of the tribunal's orders shall take effect in terms of the Applicant's application, which is hereby granted after 90 days.

DATED AT NAIROBI THIS 10TH DAY OF JANUARY 2023

EMMANUEL MUMIA CHAIRPERSON

WINNIE TSUMA VICE-CHAIRPERSON

KARIUKI MUIGUA MEMBER

DUNCAN KURIA MEMBER

RONALD ALLAMANO MEMBER

