



**Otieno & another v National Environment Management Authority & another  
(Tribunal Appeal 24 of 2023) [2024] KENET 631 (KLR) (Civ) (3 May 2024) (Ruling)**

Neutral citation: [2024] KENET 631 (KLR)

**REPUBLIC OF KENYA  
IN THE NATIONAL ENVIRONMENT TRIBUNAL - NAIROBI  
CIVIL**

**TRIBUNAL APPEAL 24 OF 2023**

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

**MAY 3, 2024**

**BETWEEN**

**MARK ODHIAMBO OTIENO ..... 1<sup>ST</sup> APPELLANT**

**SILVER BAY MANAGEMENT LTD ..... 2<sup>ND</sup> APPELLANT**

**AND**

**NATIONAL ENVIRONMENT MANAGEMENT AUTHORITY .... 1<sup>ST</sup>  
RESPONDENT**

**PARKLANE TOWERS LIMITED ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

1. The Appellant moved this Tribunal by way of a Notice of Appeal dated 21<sup>st</sup> August 2023. Contemporaneously to the Notice of Appeal, the Appellant filed a Notice of Motion application under Certificate of Urgency dated 31<sup>st</sup> October 2023. Upon reviewing the application, the Tribunal granted an interim order stopping further construction on the suit property, described as Parklane Towers, situated on Plot L.R No. MN/1/5449.
2. In response to the Appellant's appeal and application of even date, the second Respondent filed and served a Notice of Preliminary Objection, which was dismissed in a Ruling delivered by the Tribunal on 30<sup>th</sup> November 2023.
3. When the instant appeal came up for hearing on 3<sup>rd</sup> April 2024, Counsel for the Appellants, Mr. Muchiri, brought to the Tribunal's attention their application filed under Certificate of Urgency seeking the following orders:



- a. That this Honourable Court be pleased to hold that the Directors of the second Respondent Parklane Towers Limited are in contempt of court through violation of the injunction issued by this court and should show cause why they should not be punished for the said offence/violation.
  - b. That the costs of this Application be provided for.
4. In light of the egregious nature of the averments contained in the application, the Tribunal suspended the hearing and directed parties to file responses to the application and exchange written submissions. Unfortunately, as of 2<sup>nd</sup> May 2024, the eve of the Ruling, none of the parties had complied with the Tribunal's directions. More concerning to the Tribunal is the fact that the alleged contemnors did not deem it fit to address the allegations levelled against them in the contempt application.

### Issue for determination

5. Having carefully considered the pleadings, we find that the only issue dispositive of the instant application is whether directors of the 2<sup>nd</sup> Respondent are in contempt of the Tribunal's orders of 31<sup>st</sup> October 2023 and thereafter confirmed on 30<sup>th</sup> November 2023.  
  
Whether the directors of the 2<sup>nd</sup> Respondent are in contempt of the Tribunal's orders of 31<sup>st</sup> October 2023 and thereafter confirmed on 30<sup>th</sup> November 2023
6. The Appellants have urged the Tribunal to find the directors of the 2<sup>nd</sup> Respondent as being in contempt for violating the injunctive relief issued by the Tribunal on 31<sup>st</sup> October 2023 and thereafter confirmed on 30<sup>th</sup> November 2023. In a supporting affidavit sworn by Mark Odhiambo Otieno, the Appellants depone that the 2<sup>nd</sup> Respondent has continued amassing construction materials and drilling contrary to the orders of this Tribunal. In support of this averment, they have annexed photos marked 'MAO-3', which evidence ongoing construction activities on the suit premises.
7. Article 159(1) of *the Constitution* vests judicial authority in Courts and Tribunals. The said judicial authority derives from the people, and therefore, attempts to denigrate judicial authority serve as a direct attack on the people. The role of Courts and Tribunals in safeguarding the integrity of their process cannot, therefore, be gainsaid.
8. Contempt of Court proceedings provides an avenue through which Courts and Tribunals can tame the willful disobedience of court orders. They place a sobering reminder to all and sundry that we are a country of laws and not of men. In *Miguna Miguna versus Fred Matiangi, Cabinet Secretary Ministry of Interior and Co-ordination of National Government & 8 others* [2018] eKLR Justice Odunga (as he then was) pointed out that 'contempt of court is no doubt an affront to judicial authority.' As a Tribunal, we are therefore duty bound to nip such acts in the bud whenever they raise their ugly head. The application before this Tribunal offers one such opportunity.
9. The High Court, in *Sam Nyamweya & others versus Kenya Premier League Ltd and other* [2015] eKLR, defined contempt of court as constituting '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.'
10. To succeed in a contempt application, it is incumbent upon an applicant to prove four elements. These elements were laid out by the High Court in *North Tetu Farmers Co. Ltd versus Joseph Nderitu Wanjohi* [2016] eKLR as follows: "(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 defendants conduct was deliberate.”

11. We shall now turn to each of the four elements sequentially. The terms of the order issued by the Tribunal on 31<sup>st</sup> October 2023 and later confirmed on 30<sup>th</sup> November 2023 were clear and unambiguous, thereby satisfying the first element.
12. On the second element, we note that the 2<sup>nd</sup> Respondent has been represented by counsel throughout these proceedings. In fact, as the Ruling on its Notice of Preliminary Objection was read out by the Tribunal, counsel for the 2<sup>nd</sup> Respondent was present on the virtual platform. A presumption, therefore, arises, which is not unfounded, that the 2<sup>nd</sup> Respondent must have been aware of the orders and directions of this Tribunal. 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 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. We now turn our minds to the third and fourth elements. Has the 2<sup>nd</sup> Respondent deliberately breached the terms of the order? The uncontroverted evidence placed before the Tribunal paints the picture of a party intent on running roughshod over the tribunal's authority. In fact, the failure by the alleged contemnors to file a response to the contempt applications communicates as much. Why would a party, faced with proceedings of such nature, fold its arms and figuratively let the chips fall where they may?
14. It bears repeating that obedience of court orders cannot be negotiated. In *Econet Wireless Kenya Ltd v Minister for Information & Communication of Kenya & another* [2005] KLR 828, Hon. Justice Ibrahim (as he then was) underscored the importance of obeying court orders in the following manner:

“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. It is the plain and unqualified obligation of every person against whom an order is made by court of competent jurisdiction, to obey it unless and until the 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 the order believes it to be irregular or void”.
15. Further afield, in *Canadian Metal Co. Ltd v Canadian Broadcasting Corp* (N0.2) [1975] 48 D.L.R (30), the court stated as follows:

“To allow court orders to be disobeyed would be to tread the road toward anarchy. If orders of the court can be treated with disrespect, the whole administration of justice is brought into scorn... if the remedies that the courts grant to correct... wrongs can be ignored, then there will be nothing left for each person but to take the law into his own hands. Loss of respect for the courts will quickly result into the destruction of our society.”



16. The nature of prayers sought by the Appellants seek to have the Tribunal find the directors of the 2<sup>nd</sup> Respondent as being in contempt of the Tribunal's orders. Whereas the Tribunal appreciates that the said directors are not parties to the present proceedings, they are the directing mind and will of the 2<sup>nd</sup> Respondent and can therefore not be dissociated from the actions of the company. This position was affirmed in the case of John Warungu Wanjeru versus Family Bank Limited & 5 others [2021] eKLR. While quoting with approval the case of Jones versus Lipman & Anor [1962], the Court held as follows:
- ‘A company may in many ways be likened to a human body. They may have a brain and a nerve centre which controls what they do; They also have hands which hold tools and act in accordance with directions from the centre. Some of the people in the company are mere servants and agents who are nothing more than hands to do the work and cannot be said to represent the mind or will. Others are directors and managers who represent the directing mind and will of the company and control what they do. The state of mind of these managers is the state of mind of the company and is treated by the law as such.’
17. In the circumstances, we hereby lift the corporate veil and find the directors of the 2<sup>nd</sup> Respondent personally liable for disobeying the Tribunal's orders of 31<sup>st</sup> October 2023 and thereafter confirmed on 30<sup>th</sup> November 2023.

### **Orders**

18. As a Tribunal, we are unprepared to support the wilful and what is now increasingly becoming the flagrant disobedience of our orders. We will not sit back and watch helplessly as a party demonstrates utmost contempt to the authority and dignity of the Tribunal. We therefore make the following order:
- a. That the director(s) of the 2<sup>nd</sup> Respondent as appearing on the 2<sup>nd</sup> Respondent's CR-12 as of 2<sup>nd</sup> May 2024 be and are hereby found to be in Contempt of this Tribunal's orders made on 30<sup>th</sup> October 2023 and confirmed on 30<sup>th</sup> November 2023.
  - b. That Appellants are hereby directed to extract the 2<sup>nd</sup> Respondents' directors' information as appearing on the 2<sup>nd</sup> Respondent's CR-12 as of 2<sup>nd</sup> May 2024 and take out Summons against the listed director(s) within 5 days hereof, requiring them to appear before this Tribunal on 17<sup>th</sup> May 2024 for purposes of Showing Cause why they should not be punished for Contempt.
  - c. That the costs of this application shall be borne by the 2<sup>nd</sup> Respondent

**DATED AND DELIVERED AT NAIROBI, THIS 3RD DAY OF MAY 2024**

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

**WINNIE TSUMA.....VICE-CHAIR**

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

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

