



**Jubaili Agrotec Limited v Kapanat & another; Kibiku t/a K Kibiku
& Co Advocates & another (Contemnor) (Civil Appeal E796 of 2022)
[2024] KEHC 11682 (KLR) (Civ) (27 September 2024) (Ruling)**

Neutral citation: [2024] KEHC 11682 (KLR)

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

CIVIL

CIVIL APPEAL E796 OF 2022

REA OUGO, J

SEPTEMBER 27, 2024

BETWEEN

JUBAILI AGROTEC LIMITED APPELLANT

AND

MIRIAM KIGODO KAPANAT 1ST RESPONDENT

BOKU BODHA 2ND RESPONDENT

AND

PAUL KARIBA KIBIKU T/A K KIBIKU & CO ADVOCATES CONTEMNOR

JOSEPH KINGORI T/A BEMAC AUCTIONEERS CONTEMNOR

RULING

1. The applicant filed a notice of motion dated 12/9/2023 under Order 51 Rule 1 of the Civil Procedure (Amendment) Rules 2020, Rule 3(1) of the High Court Vacation (Practice and Procedure Rules), sections 5 and 10 of the *Judicature Act*, section 1A & 1B, 3, 3A of the *Civil Procedure Act* and Article 159 of *the Constitution* of Kenya. The applicant sought the following orders:
 1. Spent
 2. Spent
 3. That this honorable court be pleased to find that Paul Kariba Kibiku t/a k. Kibiku & co. advocates, being the first contemnor herein is in contempt of the court order issued on 15th August 2023.



4. That this honourable court be pleased to find that Joseph Kingori t/a Bemac auctioneers, being the 2nd contemnor herein is in contempt of the court orders issued on 15th August 2023.
 5. That the said Paul Kariba Kibiku t/a K. Kibiku & Co. Advocates and Joseph Kingori t/a Bemac Auctioneers be committed to civil jail for such a period as this honourable court shall deem necessary for being in disobedience of the court order issued on 15th August 2023.
 6. That such other or further orders as may be just to meet the ends of justice and to safeguard and protect the dignity of this honourable.
 7. That the costs of the application be provided for.
2. The application was grounded on the fact the 1st respondent received a judgment in her favour, delivered on 26th September 2023 by Hon. J.P Omollo for Kshs. 775,550/-. Thereafter the 1st contemnor through the 2nd contemnor commenced the process of execution by taking up a proclamation of attachment dated 7th August 2023 together with warrants of attachment of movable property issued on 25th July 2023 in satisfaction of the judgment and decree issued on 26th September 2022.
 3. The application was further grounded on the fact that the applicant moved the court vide a notice of motion dated 11th August 2023 seeking to set aside the said proclamation and warrants of attachment of movable property and stay of the execution of judgment delivered on 26th of September 2022 pending the determination of the consolidated appeal. The 2nd contemnor however proceeded to attach the applicant's motor vehicle registration number KCX 010Z on 14th August 2023 under the warrants of attachment.
 4. The applicant contends that on 15th August 2023, the court granted a temporary stay of execution on condition that the applicant deposits in the court the entire decretal sum in 21 days. The applicant served all the parties herein with the court order and proceeded to deposit the entire decretal sum together with the costs and interests, Kshs 931,114/-, in court on 1st September 2023.
 5. The application was also necessitated by the fact that the applicant despite having settled the 2nd contemnors negotiated fees and depositing the entire decretal sum, the contemnors have refused to release the attached motor vehicle in total disregard of the order. The applicant is apprehensive that the contemnors will proceed to illegally sell the said motor vehicle if the order isn't granted. The actions of the contemnors are in blatant disregard of the law and lower the dignity of the court.
 6. The application was together with the supporting affidavit of Wilson Julius Ondiek, the legal officer of the applicant's insurer, Britam General Insurance Company Limited. The supporting affidavit did confirm the assertions in the notice of motion in its entirety save for the fact that it further implored the court to make an order for the committal of the contemnors to civil jail for six months.
 7. The 1st contemnor, Paul Kariba Kibiku, filed a replying affidavit dated 28/9/2024 where he indeed agreed that there was an order issued by the court on 15/8/23 staying the execution of the judgment of the trial court dated 26/06/22. He further confirmed that the appellant's motor vehicle KCX 010Z had been attached on 14/8/2023 one day before the issuance and service of the order of 15/8/23 staying further execution.
 8. It was the contemnor's averments that a stay of execution order prevents the taking of further steps in the execution process towards enforcement of the judgment or order of the court but does not invalidate any steps taken in the execution process before the issuance of the said order. In keeping with



the terms of the order of stay, the attached motor vehicle has never been advertised for sale or sold as would have happened if the stay orders of 15/08/had not been issued.

9. The 1st contemnor averred that there were no orders for the release of the vehicle as of the date of filing the notice of motion dated 12/9/2023 and it was therefore baffling that the appellant is seeking to cite 1st and 2nd alleged contemnors for contempt of court orders that are yet to be issued by the court. He concluded his affidavit by inviting the court to find that the application dated 12/9/2023 is an abuse of the court process and deserves to be dismissed with costs in favor of the alleged contemnors.
10. The application was canvassed by way of written submissions. Each party has complied by filing their written submissions.
11. The applicant did raise two issues in their submission which are;
 - i. Whether the contemnors are in contempt of the court order issued on 15th August 2023
 - ii. Who should be the costs?
12. On the first issue, the applicant invited the court to consider section 5 of the *Judicature Act* which is the applicable law on contempt of court applications as it was held in the case of Samuel M.N. Mweru and others versus National Land Commission & 2 others [2020] eKLR. The applicant relied on the definition of contempt of court as stated in the case of St. Mary Academy Limited & another v Grace Njeri Mukora & another; Yvonne Jeruto & another 2021 eKLR where the court held that:

“civil contempt consists of failure to comply with a judgment or order of a court or breach of an undertaking of court....contempt of court constituted by conduct that denotes willful defiance 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.”
13. The applicant proceeded to mention the elements of contempt of court as laid out in the case of OGM (suing as the father of KGW) v FG& another [2020] which are:
 - a. That the terms of the order (injunction or undertaking) are clear and unambiguous and are binding on the defendant.
 - b. That the defendant has knowledge or proper notice of the terms of the order
 - c. That the defendant has acted in breach of the order
 - d. That the defendants conduct is deliberate.
14. On the first element, it was the submission of the applicant that the language used in the said order was plain and clear without any ambiguity to call for any explanation or clarification and therefore the advocate was and is fully capable of understanding the meaning and import of the words used in the said order. The applicant invited the court to take note of the replying affidavit of the contemnor which denotes that the contemnors indeed understood the terms of the court order issued on 15th August 2023.
15. The applicants further submitted that they served via email the court orders issued on 15/8/2023 to the contemnors and therefore they had full knowledge of them. The applicant proceeded to allude that the contemnors disobeyed the court order by continuing to attach the motor vehicle for 49 days despite the fact that it had been redeemed by the applicant when they deposited the entire decretal sum in court. The applicants concluded by inviting the court to adopt their sound reasoning on the matter and award costs to them.



16. The contemnors in their submissions relied on the case of Hamisi Saidi Ranzuga vs Mlongo Kuto where Justice D.O Chepkwony referred to the case of Cooperative Bank of Kenya Limited v Banking Insurance & Finance Union (Kenya) 2015 where the court of appeal held that:
- “...an order for stay of execution (pending appeal) is ordinarily an interim order which seeks to delay the performance of positive obligations that are set out in a decree as a result of judgment. The delay of performance presupposes the existence of a situation to stay called a positive order either an order that has not been complied with or has partly been complied with.”
17. It was therefore the submission of the contemnors that stay orders are not retrospective but rather prospective, therefore the orders issued on 15th August 2023 cannot be retrospectively invoked for the release of the vehicle. The contemnors proceed to invite the court to consider the elements of contempt of court as stated in the case of Cecil Miller v Jackson Njeru & another [2017] eKLR that is:
- a. The terms of the orders must be clear and unambiguous
 - b. The defendant had knowledge of a proper notice of the terms of the order
 - c. The defendant has acted in breach of the terms of the order
 - d. The defendant conduct was deliberate.
18. The contemnors submitted that the order dated 15th August 2023 was received on 16th August 2023 after the motor vehicle had been attached on 14th August 2023. Therefore, it is clear that there was no contempt of court because as of the day of attachment, there were no court orders for stay.
19. The contemnors contended that when the attachment was done, there were no stay orders hence no contempt of court, and in any case, if there was contempt of court, the same would be as from 15th of August 2023 after service of the order. From the date of service of the orders of stay, the contemnors submit that in the spirit of maintaining the rule of law and order and in upholding the dignity of this honorable court, they did not take any further step in the execution process. The contemnors relied on the case of Direct Line Assurance Company Limited v Mercy Nyambura Wangui 2021.
20. On the issue of costs, the contemnors cited section 27 of the *Civil Procedure Act* as well as the decision of the court in the case of Hellen Wandiga Ggeru v National Land Commission 2020 eKLR which provides that costs must follow the event. They invited the court to award the costs to them as the application filed by the applicant was unwarranted and did not stand a chance of success.

Analysis And Determination

21. Having considered all the pleadings by the parties, I find three issues for determination:
- i. Whether an order of stay can be retrospectively applied
 - ii. Whether the contemnors are in contempt of the court order issued on 15th of August 2023
 - iii. The costs of the application.
22. On the first issue, the applicant contends that the stay orders issued on the 15th of August 2023 have the effect of stopping the contemnors from proceeding with the execution which had started through the attachment of motor vehicle KCX 010Z one day before. The contemnors on the other hand argue that the order of 15/8/2023 only stopped further execution and did not affect the attachment which occurred one day before the orders.



23. The court of appeal in the case of Cooperative Bank Kenya Limited v Banking Insurance & finance union Kenya [2015] held as follows:
- “... an order for stay of execution is ordinarily an interim order which seeks to delay the performance of positive obligations that are set out in a decree. The delay presupposes the existence of a situation to stay called a positive order either an order that has not been complied with or has partly been complied with”
24. In the case of Arun C Sharma vs Ashana Raikundalia t/a A. Raikundalia & Co. Advocates & 4 others (2014) Justice F Gikonyo in addressing the effect of an order of stay after a proclamation notice has been issued stated that: “...proclamation is part of the process of execution and stay order issued after proclamation stays only further execution and does not invalidate the proclamation...”
25. In light of the above authorities, I agree with the contemnors submission that stay orders do not apply retrospectively, and therefore the stay orders issued on 15/8/2023 did not affect the attachment of the motor vehicle done on 14/8/2023
26. On the second issue, the applicant cited with approval the case of OGM (Suing as the father of KGW) versus FG & another [2020] where Mulwa J held that for a party to succeed in application for contempt of court they must satisfy the four elements which are: that the terms of the order are clear and unambiguous, that the defendant had knowledge of the order, that the defendant has acted in breach of the order and that the defendants conduct is deliberate.
27. The applicant has argued that the contemnors deliberately disobeyed the court order dated 15/8/2023 despite the terms being clear by retaining the motor vehicle for 49 days. On the other hand, the contemnors urge the court to find that by continuing to hold the motor vehicle for 49 days, they did not disobey any court since there was no court order on the release of the vehicle.
28. In addressing this issue, the court is persuaded by the reasoning of Justice D. K Njagi in the case of Kenya National Union of Nurses v County Government of Meru and another [2022] eKLR where the court stated:
- “...contempt proceedings, like submitted by the respondent call upon the alleging party to put in a high degree of proof, beyond a balance probabilities. This is because of its quasi criminal nature and consequential effect of affecting the fundamental right to liberty...”
29. The court is unable to agree that the allegation of contempt of court has been proved to the expected standard. The court finds that the attachment made before the stay order dated 15/8/2023 does not violate any order, as no existing orders were in effect at that time. On the issue of continuing possession of the motor vehicle, the court finds that those acts do not amount to further executions since there was no advertisement or sale of the vehicle during that period. Both parties have acknowledged that after the orders dated 2/10/2023 requiring the release of the vehicle, the vehicle was released and I therefore do not find contempt of any court orders issued by the court.
30. Considering the four elements of contempt of court, I find that the contemnors have not breached the terms of the court order issued on 15/8/2023. Costs follow the event and to this effect, the costs of this application are awarded to the contemnors.

DATED, SIGNED, AND DELIVERED AT BUNGOMA VIA TEAMS THIS 27TH DAY OF SEPTEMBER 2024.

R.E. OUGO



JUDGE

In the presence of:

Mr Ojong'a -For the Appellant/Applicant

Miss Kamau h/b Mr. Kibuku - For the 1st Respondent.

Miss Kagori h/b Mr. Burugu - For the 2nd Respondent

Wilkister -C/A

