



**Mohammed v Gaitho (Civil Appeal E368 of 2023)
[2024] KEHC 11841 (KLR) (Civ) (25 September 2024) (Judgment)**

Neutral citation: [2024] KEHC 11841 (KLR)

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

**CIVIL
CIVIL APPEAL E368 OF 2023**

**AM MUTETI, J
SEPTEMBER 25, 2024**

BETWEEN

JAMAL SHERRIF MOHAMMED APPELLANT

AND

EVANSON MUIRURI GAI THO RESPONDENT

*(Being an appeal against the Ruling of Hon. S.A OPANDE [PM]
delivered on 2nd May 2023 in Milimani CMCC NO. E-3826 of 2022)*

JUDGMENT

Introduction

1. The Appeal arises out of a decision by the learned Honourable Magistrate delivered on the 2nd May 2023 in which the learned Honourable Magistrate found the Appellant in contempt of Court following the disobedience of a Court order granted on the 26th July 2022. The order in question was to the effect that status quo be maintained in respect of the custody of motor vehicle registration No. KCE 173D.

Analysis

2. The Appellant was the plaintiff in the lower Court. It appears from the record that the respondent moved vide a notice of motion application dated 5th August 2022 seeking among other orders, an order for the Appellant to be committed to prison for a period of six months for breaching Court orders issued by the Court on 26th July 2022.



3. The Court orders were that the subject of breach read: -

“Having considered the application dated 26th July 2022, the same be served upon the respondent for inter partes directions on 4th August 2022. In the interim, the status quo prevailing as to the custody and possession of the motor vehicle KCW 173D as of 27th July 2022, shall be maintained until the 4th August 2022.”

4. The orders were issued ex parte by Hon. S.A Opande P.M on 26th July 2022.

Background

5. The Appellant in his memorandum of appeal raises 6 grounds to wit: -

- i. That the learned Hon. Magistrate erred in law by holding that the plaintiff committed contempt on the orders issued on 26th July 2022.
- ii. The learned Honourable Court erred in law by failing to appreciate that the notice to show cause was not served on the plaintiff personally.
- iii. The Court erred in law and fact by failing to appreciate that when the status quo order was issued on 27th July 2022, Easy Track Ltd had already released the Motor vehicle KCW 173D to the plaintiff vide of letter dated 25th July 2022.
- iv. The learned Honourable Magistrate erred in law and fact by failing to appreciate that the orders for status quo meant that the plaintiff was to continue having custody and possession of the motor vehicle KCW 173D until 4th August 2022.
- v. That the learned Honourable Magistrate erred in law in determining that the order for status quo meant that the vehicle remain in situ until 4th August 2022.
- vi. That the learned Honourable Court erred in law by finding that the plaintiff was in contempt, despite the fact that the respondents application dated 5th October 2022 had not sought for such orders.

6. The Appellant seeks to have the Lower Court ruling and the orders thereof set aside with costs.

7. The learned Honourable Magistrate in the ruling delivered on the 2nd day of May 2022 made the following orders: -

- a. That the plaintiff committed contempt on the Court orders issued on 26th July 2022.
- b. That the interested party should put in a formal application, seeking to set aside the order joining to the suit.
- c. That the plaintiff to personally appear before the Court on 5th April 2023 to explain himself and hear the contempt of Court.
- d. That the plaintiff to bear the costs of the application.

8. It is against the orders that the Appellant has moved to this Court on appeal.

9. The Appellant obtained an order staying proceedings in Milimani CMCC No. E-3826 of 2022 Jamal Sharif Mohammedvs. Evanson Muiruri Gaithopending the hearing and determination of the appeal.



Analysis

10. In determining an application for contempt, the Court hearing the application to commit a party to prison is under duty to ensure that it proceeds with the matter in strict observance of the law and procedure.
11. The nature of contempt proceedings is that they are quasi criminal in nature thus the need for strict adherence to procedure in order to ensure that the party intended to be condemned is given a fair hearing.
12. The power to punish for contempt is a power that is granted to Courts to enable them protect their authority and dignity. The authority of Courts must be respected by all subjects otherwise society would very easily slide into anarchy. The road to anarchy is undoubtedly slippery and a country must resist treading on it.
13. The power should nevertheless be exercised with great care and caution and only when its exercise is necessary for the proper administration of law and justice see *Perspective Publications Ltd Vs. State of Maharashtra (1969)2 SCR 779* at Page 791.
14. In Kenya the Law on contempt is to be found in Section 5 of the [Judicature Act](#) Cap 8 of the Laws of Kenya which states:
 - i. “The High Court and Court of Appeal shall have the same power to punish for contempt of Court as if for the time being possessed by the High Court of Justice in England, and such power shall extend to upholding the authority and dignity of subordinate Courts.
 - ii. An order of the High Court made by way of punishment for contempt of Court shall be appealable and sentence made in the exercise of the ordinary original criminal jurisdiction of the High Court.”
15. It is this Law that any Court seeking to punish for contempt must resort to See the High Court in Kenya Human Rights Commission VS. Attorney General and Another (2018) eKLR.
16. The declaration of the [contempt of Court Act](#) unconstitutional reverted the legal position back to the provision of section 5 of the [Judicature Act](#).
17. The language of section 5 (2) of the [Judicature Act](#) leaves no doubt that a Court that sets out to hear a contempt of Court application should be alive to the fact that its orders are akin to orders flowing from a criminal trial thus the need to ensure all procedural safe guards are given due weight.
18. The orders committing a contemnor to prison would invariably limit his right to liberty hence the need to bear in mind the protections afforded to accused persons under Article 50 of [the Constitution](#) since the proceedings are quasi-criminal in nature.
19. The aim of contempt proceedings is to deter men from offering any indignities to a Court of Justice.
20. The issues that arise in this matter are: -
 - i. Whether the Lower Court had the legal power to punish for contempt in the circumstances;
 - ii. Whether the contemnor was personally served with the order or was aware of the order.
 - iii. Whether the release of the motor vehicle was done in contravention of the order by the Appellant.



Jurisdiction of subordinate courts to punish contempt

21. The contempt of Court complained of, was not committed on the face of the Court.
22. The question that immediately arises is whether a subordinate Court whose order has been breached can punish for the breach without reference of the matter to the High Court.
23. In this Court's view, the jurisdiction of the Lower Court to punish for contempt in cases where its orders have been breached by parties away from the face of the Court does not obtain in our Jurisdiction.
24. The Subordinate Courts can only punish for contempt committed on the face of the Court in situations where for instance a party conducts themselves in a manner that tends prejudice the fair conduct of proceedings in a Court.
25. For instance, if a litigant obstructs a Court official in the performance of Judicial duty, or obstructs a witness from giving evidence in Court or insults the Court or other parties in the course of proceedings or behaves in any other manner so as to render the smooth conduct of proceedings impossible, the Court may summarily deal with such a litigant without to the High Court.
26. However, where a party is alleged to have breached the terms of a Court order issued by the subordinate Court, such a conduct is only punishable by the High Court in the exercise of the Jurisdiction contained upon it under section 5 of the [Judicature Act](#).
27. In order for the High Court to intervene to protect the authority and dignity of the Lower Court, the following must be established:
 - i. The terms of the order were clear and unambiguous and were binding on the alleged contemnor
 - ii. The alleged contemnor had knowledge or proper notice of the terms of order
 - iii. The alleged contemnor has acted in breach of the terms of the order, and
 - iv. The contemnor's conduct was deliberate. See Samuel M.NMweru & Others VS. National Land Commission & Others (2020) eKLR where Mathivo J particularized the four elements set out above and went on to hold that once the four elements are established willfulness and bad faith on the part of the contemnor can be inferred.
28. The elements of the contemnor's state of mind are important considering the nature of the proceedings. The Court should also be satisfied that the disobedience was willful and intentional.

The disobedience cannot be deemed contemptuous if it was caused by other reasons such as unavoidable circumstances, or inadvertence. It must be a purposeful and clear intention to flout the orders. See Kamalabai S. Naik VS. Sree Dhanjay, 1996 [3] ALT 404: 1996 (2) APLJ 152: 1996(3) ALD553.
29. It was therefore important for the respondent to demonstrate that the Appellant had the knowledge of the order and willfully disobeyed the same.
30. The Appellant's case is that as of 27th July 2022 when the order for status quo was issued, Easy Track Ltd had already released the motor vehicle KCW 173D to the Appellant vide a letter dated 25th July 2022.
31. The Lower Court in its ruling at page 17 of the Record of Appeal (pg of the ruling) took note of that fact of order of release having been made by the interested party on 25th July 2022.



32. The question that arises is, if the motor vehicle was ordered released by the interested party on the 25th July 2022 before the Court order of the 27th July 2022, what then was the “status quo” as of the 27th July 2022?
33. The learned Honourable Magistrate despite taking note of that, while dealing extensively with the sequence of events surrounding the release of the motor vehicle, he went on to find the Appellant in contempt of the order.
34. The Court held that status quo as of the 27th July 2022 was that the subject motor vehicle was in the hands of Easy Track Yard though they had ordered release of the vehicle on the 25th July 2022 to the Appellant.
35. However, the Appellant had fully repaid the loan thus the reason for the release of the motor vehicle to him on 25th July 2022 by the Third Party, Easy Track.
36. The physical release to the plaintiff (Appellant) happened on the 30th July 2022. The Court therefore was faced with a twin issue of constructive release and physical release.
37. The learned Honourable Magistrate took issue with the Appellants failure to inform Easy Track that there was a Court order for the status quo to be maintained despite knowledge of order. In this Courts view, the order having been issued after the 25th July 2022, status quo could only mean that the Motor Vehicle remains in the hands of the Appellant.
38. The Court having taken note that the Appellants counsel had failed to appear at the notice to show cause hearing, should have be cautious in finding the Appellant to have acted in contempt of the Court Order.
39. The Lower Court cited the case of Tana and Athi Rivers Development Authority VS. Jeremiah Kimigho Mwakio & 3 others (2015) eKLR where the Court of Appeal had to deal with the question of mistakes of counsel not being visited on the client.
40. The Court however does not appear to have correctly applied the decision to the circumstances of the present case.
41. If the Magistrate was persuaded that it was out of counsel’s mistake that the disobedience happened, could the Court then lawfully visit the consequences of such disobedience on the client without violating the Appellants right to a fair hearing? Certainly not.
42. The Court in my view ought to have given the Appellant the benefit of doubt.
43. I do not find any evidence of blatant breach of the order that could be ascribed to the Appellant taking into account all the circumstances.
44. In any event if the physical release of the motor vehicle was done on 30th July 2022 by Easy Track Ltd after release by letter on 25th July 2022, the Appellant was in lawful constructive possession as of the 26th July 2022. The fact that he had not collected the motor vehicle from Easy Track Ltd does not change the fact that he had possession.
45. In fact, there was thereafter no need to communicate the orders of status quo to Easy Track Ltd since they only had physical custody of the vehicle but release had happened on 25th July 2022 upon fully repaying the loan. Legally ownership vested in the hands of the Appellant and he had the legal right to hold the motor vehicle.



46. The Easy Track Ltd Company was not a party to the order of 26th July 2022. If the Court had intended that the orders apply to them the order of 26th July 2022 would have been worded differently and with particularity.
47. The phrase “Status Quo” is subject to construction and misconstruction. It calls for parties to interpret the order and give it meaning as per their appreciation of circumstances that obtain at a particular moment in time. A court must therefore be precise and concise as to what is the status quo if such is the phraseology used in an order.
48. The Appellant in the matter knowing that he had repaid the loan and the motor vehicle was released to him on 25th July 2022 was well within the bounds of the order on 26th July 2022 since legally he was in possession of the motor vehicle though not physically.
49. If the order by the Magistrate was expressed differently directing Easy Track Ltd to continue holding the motor vehicle and the Appellant went ahead to take the same from them despite the orders, that would have amounted to willful disobedience of the order thus punishable by the Court.
50. However, considering how the order was expressed, I find and hold that the Appellant by taking physical possession of the motor vehicle did not violate the order.
51. The Court had ordered “the status quo prevailing as to the custody and possession of the motor vehicle KCW 173D as at 27th July 2022 shall be maintained until 4th August 2022”.
52. The motor vehicle was released by Easy Track Ltd who were not parties to the order on 25th July 2022 thus possession shifted to the lawful owner then being the Appellant. Physical possession was with Easy Track Ltd but for all intent and purpose they continued in possession awaiting collection by the Appellant.
53. The fact of contempt proceedings being quasi criminal in nature raises the obvious question as to the standard of proof in such cases. The party alleging contempt must prove a clear and unequivocal command and equally clear and undoubtful disobedience. In *Bhatnager Vs. Canada (Minister for Employment and Immigration)*, 1990(ANL11120[SCC], (1990)2SCR 217 the Canadian Supreme Court held: -
- “An allegation of contempt of Court is criminal or at least quasi criminal in character. It is necessary, therefore, that the constituent elements of contempt be proved by the party alleging contempt beyond a reasonable doubt.”
54. The standard set by the Canadian Supreme is such that it is not enough for a party such as the respondent here to simply state that there was an order directed to the Appellant which he disobeyed. The respondent was under duty to prove beyond a reasonable doubt that the Appellant by taking physical possession of the motor vehicle was in breach of the order.
55. The respondent did not discharge that burden given the omnibus nature of the order. The fact of Easy Track Ltd not having been a party to the order cannot be ignored. It was the Respondents duty to enjoin them at the earliest if he wished to have them continue holding the motor vehicle.
- The Appellant could not be expected to fail to collect the motor vehicle from Easy Track Ltd after the release on 25th July 2022 and since the order of 26th July 2022 did not bar him from doing so, I see nothing wrong with his conduct in the circumstance.



Determination

56. In Conclusion, find and hold that the respondents did not discharge the burden of proof to demonstrate unequivocally that the Appellant was in violation of the Court Order.
57. As a consequence, therefore, this Court finds that the orders by the learned Honourable Magistrate giving rise to this appeal were erroneously granted. The orders are hereby set aside.
58. The Appellant's appeal is allowed with costs. The suit before the Lower Court is to proceed to its logical conclusion.
59. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 25TH DAY OF SEPTEMBER, 2024.

HON. A.M MUTETI

JUDGE

In the presence of:

Kiptoo: Court Assistant

Owino & Co. Advocates for the appellant

Mwachofi Advocate for the Respondent

Appellant

