



REPUBLIC OF KENYA



KENYA LAW
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**Murunga v Barasa & another (Civil Appeal E069 of 2022)
[2023] KEHC 428 (KLR) (26 January 2023) (Ruling)**

Neutral citation: [2023] KEHC 428 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUNGOMA
CIVIL APPEAL E069 OF 2022
DK KEMEL, J
JANUARY 26, 2023**

BETWEEN

SULEIMAN KASUTI MURUNGA APPLICANT

AND

DIDMUS WEKESA BARASA 1ST RESPONDENT

KENNETH ODHIAMBO T/A JENKS AUCTIONEERS 2ND RESPONDENT

RULING

1. By an application dated August 23, 2022, the applicant herein sought the following orders against the respondents;
 - a. The court does issue summons and or notice to the contemnors/respondents to appear before the court to show cause why they should not be cited and committed to prison for such period as the court may deem fit and they be ordered to pay the fines and damages for willful and deliberate disobedience of the court orders issued on August 11, 2022.
 - b. The court does cite the respondents for contempt of court orders dated 11/8/2022 and commit them to prison for six months and order them to surrender to the applicant the suit motor vehicle registration number KBX 005L Toyota Land Cruiser unconditionally.
 - c. The purported sale of suit motor vehicle registration number KBX 005L Toyota Land Cruiser on August 12, 2022 in total defiance and disobedience of the court's orders issued on August 11, 2022 and served be set aside, vacated and or annulled.
 - d. The contemnors to pay such damages caused to the applicant as the court may deem fit for the embarrassment caused
 - e. Costs of the application be provided for.



2. The application is predicated on the grounds on the face of the motion which are *inter alia*; that the court issued orders of stay of sale of the suit motor vehicle on August 11, 2022 which orders were served on the 1st respondent's counsel and personally on the 2nd respondent; that the 2nd respondent called the applicant's counsel inquiring on the orders and who indicated that he had been asked by the 1st respondent's counsel to proceed with the sale; that despite the order, the respondents proceeded with the sale causing the applicant mental anguish and embarrassment and damages over his vehicle worth over Kshs 7,000,000/- but sold at a throw away price and finally that the applicant had made good his payment of costs and that the respondents had no justification whatsoever for the sale.
3. The 1st respondent opposed the application through a replying affidavit dated October 11, 2022 wherein he deponed inter alia; that the orders appealed against were orders issued by the Deputy Registrar under Order 49 and thus the applicant's recourse is in a reference against the taxed bill of costs; that there is a warrant of arrest issued against the applicant over the suit motor vehicle and before the same is purged, he ought not to be given audience by the court; that they proceeded with the sale of the vehicle on August 12, 2022 without knowledge of the orders issued on August 11, 2022 which only came to his counsel's attention on August 15, 2022 after the general elections and while in custody over allegations of electoral violence; regarding the issue of service on the 2nd respondent, he depones that the 2nd respondent was not a party to the application dated 11th August and he could not therefore be aware of the orders which he is said to have ignored.
4. The 2nd respondent filed a replying affidavit sworn on October 11, 2022 deponing inter alia; that he sold the suit motor vehicle by public auction on August 12, 2022 by which time he had no knowledge of the orders stated but only got to know of the orders on 12th August after the sale. He denied selling the vehicle below the reserve price as the same was valued by a firm of repute.
5. The application was canvassed by way of written submissions. The applicant submits on the issue of whether an order was issued that the fact that this court issued an order on 11/8/2022 has not been disputed. On the issue of service, it is argued that the order was served on the respondents electronically by way of WhatsApp and email.
6. It is submitted that the order was disobeyed in that both parties acknowledge the vehicle was sold on August 12, 2022 after the stay orders had been issued on 11/8/ 2022. That according to the authority in *Double Clean Limited & others vs Jambo Holdings Limited & another* Civil Appeal 100 of 2016, there is need to guard and protect the dignity of court orders.
7. On the competence of the appeal, it is submitted that the issue in the application is not about the competence of the appeal but the disobedience of the orders issued on 11/8/2022.
8. For the respondents, it is submitted that the application is anchored on non-existent law in that that the applicant failed to join the 2nd respondent in the application and failed to include the penal notice. For this argument, the following authority in *Alfred Mutua vs Boniface Mwangi* (2022) eKLR has been cited in support.
9. On the issue of whether the applicant has audience before this court, the respondent submits that the applicant has been found in contempt by this court and therefore has no audience until he purges the contempt. On this issue, the respondent relies on the authorities in *Econet Wireless Kenya Ltd vs Minister For Information and Communication Kenya & another* (2005) eKLR and *Abbeybarn Limited v Infinity Gemstones Ltd* (2000) eKLR.
10. On whether the conditions for contempt have been met, it is contended that the terms of the order were not clear unless served with the application which was not served in this case. That similarly, personal



service was not effected on the 1st respondent as he had been arrested on 11/8/2022 as well as that his advocates on record only came back to office on 15th August after the general elections break when they became aware of the orders. That the order was served after 5.00 pm which according to Order 50 Rule 9 is deemed to have been served the next day. In support of this, the following authorities have been cited; *Samuel M.N Mweru & others Vs National Land Commission and 2 others* (2020) eKLR and *Sheilla Cassat Issenberg & another Vs Antony Machatha Kinyanjui* (2021) eKLR

11. Lastly, on whether the orders sought ought to be granted, it is contended that the applicant is a serial contemnor out to frustrate the respondents' bid to recover their costs by acquiring a loan facility against the suit vehicle. That the advocate has not released the proceeds of the sale to the 1st respondent and the application therefore ought to be declined

Analysis and determination

12. The gist of the application is a prayer for the finding and holding the respondents in contempt of the court order issued on August 11, 2022 and served on the respondents the same day. That the respondents sold the suit vehicle on 12/8/2022 in total defiance and disobedience of the orders so issued.
13. I have taken time to examine the order in question issued by Justice Musyoka at Kakamega High Court during the August recess and a casual look at the order shows the following; the 2nd respondent is not a party to the application and or the order. Paragraph 4 of the order states;

That in the meantime, let there be stay of execution in terms of prayer (b) of the motion to subsist till 18/8/2022.
14. Prayer on the notice of motion dated August 8, 2022 was couched in the following terms;

That pending the hearing of this application inter parties there be a temporary stay of execution and sale by auction of the subject motor vehicle Toyota Prado cruiser KBX 005L in Bungoma election petition no. 2 of 2017 pending hearing and determination of this application.
15. From the above, it is clear and I agree with the respondent that the order unless served with the application was ambiguous.
16. Nonetheless, for a finding of contempt to be entered against an alleged contemnor, the following conditions have to be met as stated by Mativo J in *Molly Wambui Kiragu (Suing as Administrator of the Estate of the late Samuel Kiragu Michuki) v Governor - Nairobi City County & another* [2018] eKLR quoting from the authors of the book *Contempt in Modern New Zealand* laid down the following as the necessary ingredients for contempt of court;
 - 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.
17. Regarding the unambiguity, i have explained earlier that the order was ambiguous unless served with the application. Secondly, the 2nd respondent was not a party to the application which gave rise to the



orders and therefore not binding on him. It is however not in doubt that the auctioneer was acting on the 1st respondent's instructions and therefore the orders binding on him. This is not the case here since the application before me is one of contempt and the standard of proof in such a case is higher.

18. The second limb relates to whether the alleged contemnor had notice of the order. On this, I associate myself with the holding by Lenaola J (as he then was) in *Basil Criticos Vs Attorney General and 8 Others* [2012] eKLR where the learned judge pronounced himself as follows:-

“...the law has changed and as it stands today knowledge supersedes personal service.....where a party clearly acts and shows that he had knowledge of a Court Order; the strict requirement that personal service must be proved is rendered unnecessary”

This position has been affirmed by this Court in several other cases including the Wambora case(supra).

It is important however that the court satisfies itself beyond any shadow of a doubt that the person alleged to be in contempt committed the act complained of with full knowledge or notice of the existence of the order of the Court forbidding it. The threshold is quite high as it involves possible deprivation of a person's liberty

19. The applicant herein claims that he served the order and the application upon the respondents via WhatsApp and email address. The 1st respondent however argues that his advocates had taken leave from office for the general elections break and only came back on August 15, 2022 which time the motor vehicle had been sold.
20. On his part, the 2nd respondent asserted that he came to know of the orders on August 12, 2022 after he had sold the vehicle.
21. In proof of service upon the respondents, the applicant has attached evidence of service via mail.
22. I am aware of the amendments to the *Civil Procedure Rules* in 2020 to accommodate service by electronic means. These amendments introduced Order 5 rule 22B and the Practice Directions for the Protection of Judges, Judicial Officers, Judiciary Staff, Other Court Users and the General Public from the Risks Associated with the Global Corona Virus Pandemic published in Gazette Notice No. 3137 which now apply to service of court processes including orders.
23. The proof of service supplied by the applicant shows that an email was sent to the respondents through walukwe@ochiengwalukweadvocates.com at 5.16 pm and to jenksauctioneers2000@gmail.com at 5.09 pm on 11/8/2022. By this time, the offices are presumably closed and the earliest the recipients could have seen them was the following day, the day of the auction. There are screenshots of WhatsApp communication to the respondents as well served earlier at 4.00 pm.
24. All these taken together, and in the absence of other proof that the respondents could have been aware of the orders, I am inclined to find that the suit vehicle was sold without proper notice of the orders on the respondents' part.
25. The third and fourth conditions are that the defendant acted in breach and that the breach was deliberate. On this, my finding is that at the time of sale of the motor vehicle, the respondents may not have had proper notice of the order and therefore in the absence of such knowledge, I cannot find that the conduct was deliberate.
26. I am further guided by the principle that a finding of contempt is a serious allegation which has the effect of having one committed to jail in breach of his right to liberty. Judicial authorities have held



that the proof of such conduct giving rise to contempt ought to be proved to a standard higher than the one required of ordinary civil cases.

27. The above was stated in *Gatharia K. Mutikika v Baharini Farm Limited* [1985] KLR 227, where it was held that:

A contempt of court is an offence of a criminal character. A man may be sent to prison. It must be proved satisfactorily.... It must be higher than proof on a balance of probabilities, almost but not exactly, beyond reasonable doubt. The standard of proof beyond reasonable doubt ought to be left where it belongs, to wit criminal cases. It is not safe to extend it to offences which can be said to be quasi-criminal in nature.

However, the guilt has to be proved with such strictness of proof as is consistent with the gravity of the charge... Recourse ought not to be had to process of contempt of court in aid of a civil remedy where there is any other method of doing justice. The jurisdiction of committing for contempt being practically arbitrary and unlimited, should be most jealously and carefully watched and exercised with the greatest reluctance and the greatest anxiety on the part of the judge to see whether there is no other mode which is not open to the objection of arbitrariness and which can be brought to bear upon the subject... applying the test that the standard of proof should be consistent with the gravity of the alleged contempt... it is competent for the court where contempt is alleged to or has been committed, and or an application to commit, to take the lenient course of granting an injunction instead of making an order for committal or sequestration, whether the offender is a party to the proceedings or not.

28. My finding on the issue therefore is that the applicant has not proved that the respondents acted in contempt of court orders issued on 11/8/2022. In any event, the proceeds obtained from the sale are ascertainable and in the event the appeal is successful, the applicant will be refunded the value of his motor vehicle.
29. The upshot of the foregoing observations is that the applicant's application dated August 23, 2022 is devoid of merit. The same is dismissed with costs to the respondents.

DATED AND DELIVERED AT BUNGOMA THIS 26TH DAY OF JANUARY, 2023

D.KEMEI

JUDGE

In the presence of:

Wangila for Sichangi for Appellant/Applicant

Umazi for Walukwe for 1ST and 2nd Contemnors/Respondents

Kizito Court Assistant

