



**Thika Road Gym Limited v TRM Holdings Limited (Civil Appeal  
E540 of 2021) [2022] KEHC 11132 (KLR) (Civ) (31 May 2022) (Ruling)**

Neutral citation: [2022] KEHC 11132 (KLR)

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

**CIVIL**

**CIVIL APPEAL E540 OF 2021**

**JK SERGON, J**

**MAY 31, 2022**

**BETWEEN**

**THIKA ROAD GYM LIMITED ..... APPELLANT**

**AND**

**TRM HOLDINGS LIMITED ..... RESPONDENT**

*(An appeal from the ruling of the Honourable L.L. Gicheha (Mrs.) Chief Magistrate  
delivered on 27th August, 2021 In Thika Road Gym Limited v TRM Holdings Limited)*

**RULING**

- 1 This ruling relates to the following applications;
  - i. The appellant's notice of motion dated August 27, 2021
  - ii. The respondent's notice of motion dated September 1, 2021
  - iii. The appellant's notice of motion dated September 9, 2021.
- 2 The parties agreed to have the three applications dispensed with jointly by way of written submissions.

**I. The appellant's Notice Of Motion Dated August 27, 2021**

- 2 The appellant is seeking the following orders;
  1. Spent.
  2. Spent.
  3. That this honourable court be pleased to issue a temporary injunction restraining the respondent, its servants/employees, agents, auctioneers and/or representatives from breaking



into the appellant's premises Units 60 to 69 situate on 2<sup>nd</sup> Floor of Thika Road Mall, LR Number 12803/53, proclaiming, seizing, attaching and selling the appellant's equipment and/or goods pending the hearing and determination of the appeal herein.

4. That the costs of this application be provided for.
- 3 The application is anchored on sections 1A, 1B & 3A of the *Civil Procedure Act* together with the provisions of order 42 rule 6 (6) and order 51 rule 1 of the *Civil Procedure Rules*, 2010 and is further supported by the affidavit of James Holden, the Managing Director of the appellant herein. The application is opposed via a replying affidavit sworn by Dipti Shah and Jeremiah Kiarie Muchendu T/a Icon Auctioneers both on September 10, 2021. The grounds of the application are that following the issuance of breaking in orders by the Honourable LL Gicheha (Mrs) Chief Magistrate on August 27, 2021 in CMCC No 1925 of 2020; Thika Road Gym Ltd V Trm Holdings Ltd, and having filed an appeal against the said ruling, the execution remains eminent. Further, the appellant is apprehensive that unless the orders for injunction are granted, the appeal filed will be rendered nugatory. Additionally, the appellant stands to suffer substantial loss and have its reputation damaged irreparably if the client's data is compromised.

### **Appellant's Submissions;**

- 4 In its submissions, the appellants argue that the appeal is arguable and not frivolous. Reference is made to the case of Patrick Kalava Kulamba & Another V Philip Kamosu And Roda Ndanu Philip (suing As The Legal Representative Of The Estate Of Jackline Ndinda Philip (deceased))[2016] eKLR where the court summarized the principles for granting injunction pending appeal as follows;
  - a. The appeal is arguable and is not frivolous
  - b. The discretion to grant the orders should be refused if it would inflict greater hardship that it would avoid.
  - c. Refusal of the injunction would render the appeal nugatory
  - d. The court would be guided by principles in the *Giella v Cassman Brown & Company Ltd*.
- 5 It is the appellant's submission that the appeal is arguable for the reasons that the distress on its assets was illegal since the respondent was in violation of the orders issued on October 13, 2020 on the reconciliation of the service charge. Secondly, the appellant argues that having invoked the provisions of force majeure under the lease, the lower ought not to have enforced the rent obligations. The appellant further argues that the notice of distress dated March 21, 2021 was *res judicata* having been considered in the court's ruling of October 13, 2022 hence, rendering the trial court functus officio. The appellant has referred to the case of *Accredo Ag & 3 Others V Steffano Uccelli & Another* [2019] eKLR in relation to the application of the doctrine of *res judicata*.
- 6 The appellant further submit that it will suffer substantial loss and its reputation will be irreparably damaged if the orders sought are not granted. It is argued for the appellant that since the equipment attached and earmarked for sale by the auctioneers are gymnasium equipment and clients' data it will not have a business to return to. The appellant's further submission is that if the injunction sought is declined, the appeal filed will be rendered nugatory because the sale of the gymnasium equipment, the loss of business and goodwill cannot be reversed or restored. The appellant submits that on a balance of probabilities, it stands to suffer greater hardship than the respondent and contends that it is willing to furnish security pending the hearing and determination of the appeal.



### **Respondent's Case;**

7 In her replying affidavit, Dipti Shah, a Financial Controller at the respondent's company, states that on August 30, 2021 following the court ruling of August 27, 2021, Icon Auctioneers in the company of Kasarani Police Station entered the appellant's leased premises and attached the goods and/or equipment in situ so as to recover the outstanding rent arrears. The respondent deposes that as a consequence, the temporary injunction orders issued on August 30, 2021 in favour of the appellant and subsequently served upon the respondent and Icon Auctioneers on August 31, 2021 were overtaken by events. Jeremiah Kiarie Muchendu, an auctioneer, confirms receiving instruction from the respondent and breaking into the leased premises on August 30, 2021.

### **Respondent's Submissions;**

8 The respondent submits that the substantive order No 3 being sought by the appellant has been overtaken by events for the reason that the enforcement of the breaking order was executed on August 30, 2021 and the order for temporary injunction was received via an email on August 31, 2021. It is the respondent submission that having legally commenced the execution, it ought to be allowed to proceed with the advertisement and sale of the proclaimed goods so as to recover the outstanding rent arrears.

9 The respondent further submits that the appellant has failed to demonstrate how it will suffer substantial loss and or have its reputation irreparably damaged. It is the respondent's assertion that the inventory prepared by the auctioneers and marked 'JKM 5' comprises of only gymnasium equipment and not client's data. The respondent further submission is that it has a right to levy distress for unpaid rent which stood at Kshs 39,248,982 as at August 31, 2021.

10 It has made reference to the case of *Michael Ntouthi Mitheu Vs Abraham Kivondo Musau* (2021) eKLR where Odunga J cited the case of *Samvir Trustee Ltd Vs Guardian Bank Limited* where it was held that the court is empowered to carry out a balancing exercise to ensure justice and fairness thrive within the corridors of the court. And in the case of *Endoros Enterprises Limited Vs Wild Living Business Hub Co Ltd* [2021] eKLR where Nyakundi J held;

'Therefore, that is a knife that cuts on both sides as the respondent has a legitimate expectation to earn some returns for the investment in the said property under lease with the applicant and the would be detrimental to the applicant interest. It is to be remembered that the respondent stands to suffer losses for the unpaid rent which has fallen due and not released by the applicant...

... In a nutshell, the applicant has not made out a strong case for grant of an injunction under order 40 rule 1, 2 & 3 and stay of execution pending hearing and determination of the intended appeal in terms of order 42 (1) (6) of the *Civil Procedure Rules*.'

11 On what constitute an appropriate security, the respondent submit that the payment of outstanding rent arrears of Kshs 39,248, 982.94 within given timelines will be proper and will ensure that a balance of the parties interests is achieved.

### **II. The Respondent's Notice Of Motion Dated September 1, 2021.**

12 The respondent is seeking the following orders;

1. Spent.



2. That this honourable court be pleased to discharge and/or set aside the *ex-parte* orders granted on August 30, 2021 and all the consequential orders arising therefrom.
  3. That the costs of this application be borne by the appellant.
- 13 The application is anchored on sections 1A, 1B & 3A of the *Civil Procedure Act* together with the provisions of order 40 rule 7, order 42 rule 6 and order 51 rule 1 of the *Civil Procedure Rules*, 2010. It is further supported by the affidavit of Dipti Shah, the financial controller of the respondent herein sworn on September 1, 2021 and a further affidavit sworn on September 17, 2021. The application is opposed by the appellant via a replying affidavit sworn by James Holden. The grounds of the application are that there exists a Landlord Tenant relationship as between the appellant and the respondent having entered into a lease agreement dated January 18, 2019 for the lease of unit 60-69, 2<sup>nd</sup> floor on the respondent's premises situate on Thika Road Mall. That vide a ruling delivered on August 27, 2021, the respondent was granted breaking orders, permission to sell the appellant's gymnasium equipment in situ and an order that Kasarani Police Station provide security. That on August 31, 2021, having partly executed the court orders and taken an inventory of the appellant's equipment, the respondent was served with an order of temporary injunction by the appellant's advocate.
- 14 That respondent deposed that the appellant is guilty of material non-disclosure and specifically of the lower court orders of October 13, 2020 that required it to continue paying rent and service charge. According to the respondent, the appellant sought inter alia temporary injunction restraining the respondent from proclaiming, seizing, attaching, terminating the lease in CMCC NO 1925/2020; Thika Road Gym Limited Versus Trm Holdings Limited where the respondent was demanding payment of rent arrears of Kshs 14,272,321.27. Subsequently, in a ruling delivered on 13/10/2020, the appellant was granted interim relief subject to payment of Kshs 7,707,921.00 as security in an interest earning account in the joint names of both advocates and was ordered to pay rent as it fell due. The appellant defaulted and the respondent *vide* application dated November 24, 2020 sought for breaking in orders which were granted in a ruling delivered on August 27, 2021. The respondent contends that the appellant filed an appeal against the orders of October 13, 2020 in NRB CIVIL APPEAL NO 299 of 2020 which was dismissed.

### **Respondent's Submissions;**

- 15 The respondent reiterates that the appellant failed to disclose that it had initially filed Nairobi Civil Appeal No 299 of 2020; Thika Road Gym Limited versus TRM Holdings Limited against the ruling of October 13, 2020. Secondly, the appellant had failed to pay the rent as it fell due pursuant to the court order of October 13, 2020 and finally, it had failed to disclose that it had rent arrears of Kshs 39,248,982.94 as at August 31, 2021. The respondent made reference to the case of *Andrew Wanjohi Kaburu Vs Kaburu Muteti & Co Advocates* [2016] eKLR where Olao J held that;

“More fundamentally, it has been demonstrated above that he is in arrears of rent since April 2015 and only paid rent for March 2015 following a court order. The appellant/applicant has not only approached the court with soiled hands but is also seeking the court to indulge him when he is himself in breach of a covenant to pay rent. A party who breaches his part of an agreement cannot obtain an order of injunction to restrain the other party from exercising an option that is legally available to him. The respondents herein have the option of evicting the appellant/applicant granted to them by a court of competent jurisdiction. It would be inequitable to restrain them when the appellant/applicant is himself in breach of a covenant.”



16 Reliance was made to the case of *Ochola Kamli Holdings Limited Vs Guardian Bank Limited* [2018] eKLR where Makau J held;

23. The court is alive to the fact that an interlocutory injunction, being an equitable remedy, would be discharged, upon being shown the person's conduct with respect to matter, pertinent to the suit does not meet the approval of the court which granted the orders which is the subject matter and especially where a party upon getting the injunction orders sits on the matter and uses the orders to the prejudice of the opponent. The orders of injunction are mainly intended to preserve the subject matter with a view to have expeditious determination but not to oppress another party nor should an injunction be used to economically oppress the other party or to deny justified repayment of outstanding loan. That once such a post-injunction behavior is exposed it would in my view be a ground to discharge an injunction because the order obtained would be an abuse of the purpose for which the injunction was granted. No court would allow its orders to be used to defeat the ends of justice. Further by operation of the law the order obtained by the plaintiff has since lapsed as 12 months has lapsed since its issuance and no extension has been sought.

24 The respondent further contend that the appellant is undeserving of the injunctive orders sought as it has little regard for court orders and is a dishonest litigant. According to the respondent, the appellant sold the proclaimed gym equipment to a third party, who has filed an objection before the lower court proceedings, on 2/12/2020. It has also failed to comply with the court orders of October 13, 2020 directing it to continue paying rent as and when it became due. Reference has been made to the case of *Abbeybarn Limited Vs Infinity Gemstones Limited* [2000] eKLR where Waki J stated that;

25 A passage from a House of Lords decision cited with approval by our own Court of Appeal seems to lend cover to such mischief: Per Lord Diplock in *Isaacs v Robertson* [1984] 2 All ER 141 at 142.

"It is the plain and unqualified obligation of every person against, or in respect of whom an order is made by a Court of competent jurisdiction to obey it unless and until that 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 an order believes it to be irregular or even void. Lord Cottenham, L C said in *Chuck v Cremer* [1846] 1 Coop temp Cott 338 at 342, 47 ER 884 at 885) " A party, who knows of an order, whether null or valid, regular or irregular, cannot be permitted to disobey it..... It would be most dangerous to hold that the suitors, or their solicitors, could themselves judge whether an order was null or valid - whether it was regular or irregular. That they should come to the Court and not take upon themselves to determine such a question. That the course of a party knowing of an order, which was null or irregular, and who might be affected by it, was plain. He should apply to the court that it might be discharged. As long as it existed it must not be disobeyed."

26 It is the respondent's further submission that Covid 19 Pandemic does not fall under the ambit of force majeure as contemplated and that the appellant ought



not to rely on it under clause 1.1.16 of the lease agreement. The respondent also relied on the case of *Laser Eye Center Limited Vs Pbm Nominees Limited* [2020] eKLR.

### **Appellant's Case;**

- 17 The appellant in its replying affidavit contends that the respondent has failed to demonstrate any sufficient reasons for setting aside the orders of August 30, 2021. The appellant maintains that it has offered to furnish security pending the hearing and determination of the appeal and that it is important that the court preserve the premises and the equipment, which are the subject matter of the appeal, pending the hearing and determination of the same. The appellant confirms that it entered into a Lease agreement with respondent, however, when Corona Virus was confirmed in Kenya in March, 2020, its operations were paralyzed following the subsequent government directives. The appellant contends that following the issuance of a notice of distress dated 9/4/2020 demanding Kshs 15,198,138.25 by the respondent on account of outstanding rent, service charge and promotional charges for the period between April 1, 2020 and June, 2020, it filed a suit at Milimani CMCC No 1925 of 2020 and sought an injunction.
- 18 The court in its ruling ordered the payment of Kshs 7,707,921.00, which it paid, and payment of rent as it falls due. The appellant confirms that the parties being aggrieved by the lower court's ruling of October 13, 2020 filed two separate appeals; NRB CIVIL APPEAL NO 299 of 2020 and NRB CIVIL APPEAL NO E047 of 2020 which are yet to be heard. The appellant avers that the allegations by the respondent that it is guilty of material non-disclosure are not only baseless but are misleading as the same are not material for the determination of the present application for injunction pending appeal of the ruling of August 27, 2021.

### **Appellant's Submissions;**

- 19 In its submissions, the appellant states that although the court has jurisdiction to set aside orders issued due to material non-disclosure, the principles applicable are as set out in the case of *Kenya Electricity Transmission Company Limited V Kibotu Limited* [2019] eKLR. The held that;

“The fundamental principles of non-disclosure of material facts that an applicant must adhere to are as follows:

- a) The applicant is under an obligation to the court to make the fullest possible disclosure of all material facts within his knowledge,
- b) The duty of disclosure therefore applies not only to material facts known to the Applicant but also to any additional facts which he would have known if he had made sufficient inquiries.
- c) The extent of the inquiries which will be held to be proper, and therefore necessary, must depend on all the circumstances of the case including (a) the nature of the case which the applicant is making when he makes the application, (b) the order for which the application is made and the probable effect of the order on the defendant, and (c) the degree of legitimate urgency and the time available for the making of the inquiries.
- d) Whether the fact not disclosed is of sufficient materiality to justify or require immediate discharge of the order without examination of the merits depends



on the importance of the fact to issues which were to be decided by the Judge in the application.

- e) The question whether the non-disclosure was innocent, in the sense that the fact was not known to the applicant or that its relevance was not perceived, is an important consideration but not decisive by reason of the duty on the applicant to make all proper inquiries and to give careful consideration to the case being presented.
- f) Finally, it is not every omission that the injunction will be automatically discharged.”

20 It is the appellant’s submission that in its application for injunction pending appeal dated August 27, 2021, it disclosed all the relevant facts. These relevant facts, according to the appellant, are that being aggrieved by the breaking orders of August 27, 2021 granted by hon LL Gicheha (Mrs) Chief Magistrate in CMCC No 1925 of 2020, it filed an appeal and sought an injunction pending appeal. The appellant further submit that this court has jurisdiction to consider an application for stay and make any order as it deems fit regardless of whether the same has been allowed or rejected by the lower court. Referenced has been made to the case of *Patrick Kalava Kulamba & Another V Philip Kamosu And Roda Ndanu Philip (suing As The Legal Representative Of The Estate Of Jackline Ndiinda Philip (deceased)* [2016] eKLR where Meoli J held that;

“Order 42 rule 6 (1) of the *Civil Procedure Rules* is in the following terms:-

“No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.”

12. For the purposes of this case, the operational words are as underlined above. Thus, whether an application for stay pending appeal has been allowed or rejected in the lower court, the High Court “shall be at liberty .....to consider” an application for stay made to it and to make any order it deems fit. The High Court in that capacity exercises what can be termed “original jurisdiction”. And from my reading of the rule, the jurisdiction is not dependent on whether or not a similar application had been made in the lower court, or the fate thereof.”

### **III. The Appellant ’s Notice of Motion dated September 9, 2021.**

21 The appellant is seeking the following orders;

- 1. Spent.
- 2. That this honourable court be pleased to find that the respondent and its directors being Dilipkumar Premchand Savla, Prafulkumar Premchand Savla, Babu Dalpatrai Kalidas Mehta, Vinodrai Ramji Shah, Deepak Kantilal Shah, Altaff Parpia, Dipti Shah and Jeremiah Muchendu t/a Icon Auctioneers are in contempt of court for breach of the order of the court



made on August 30, 2021 restraining the respondent, its servants and/or employees, agents, auctioneers or representatives from breaking into the appellant/applicant ("the appellant")'s premises and proclaiming, seizing, attaching and selling the appellant equipment and/or goods pending the inter panes hearing and determination of the appellant's application for injunction dated August 27, 2021.

3. That pursuant to order (1) above, this honourable court be pleased to cite the contemnors for contempt and order for their committal to civil jail for a period of not more than six (6) months for disobedience of the orders issued on August 30, 2021 by hon Justice Said Chitembwe.
  4. That pursuant to order (1) above, this honourable court be pleased to cite the respondent for contempt and order for payment of a fine or attachment of its property for sale to recover the fine for disobedience of the orders issued on August 30, 2021 by Hon Justice Said Chitembwe.
  5. That this honourable court be at liberty to impose any other sanction against the respondent and the contemnors which it may deem fit and just, including denial of audience until the respondent and Contemnors purge their contempt.
  6. That the costs of and incidental to this application be provided for.
- 22 This application, anchored on sections 34, 63(c) and (e) of the *Civil Procedure Act*, section 5 of the *Judicature Act* cap 8 and other enabling provisions of the law is supported by the affidavit of James Holden, Managing Director of the appellant sworn on September 9, 2021. The grounds on which the application is premised are that being aggrieved by the ruling of hon LL Gicheha (Mrs.) Chief Magistrate in Milimani Cmcc No 1925 of 2020; Thika Road Gym Limited versus TRM Holdings Limited, the appellant filed an appeal in Nairobi Civil Appeal No E540 of 2021 and sought for injunction against the breaking in orders granted on August 27, 2021. That on August 30, 2021, this court granted the injunctive orders as against the respondent which were served on August 31, 2021 at 2;35pm. That despite service, the respondent has continued to lock the premises, deny the appellant access and has threatened to put the gym equipment on sale.

### **Appellant's Submissions;**

- 23 The appellant submits that despite serving the respondent's advocates and the auctioneers with the orders for injunction, the respondent did proceed with the proclamation and locked the appellant's premises. That despite acknowledging receipt of the order, the respondent has continued to lock the appellant's premises. The appellant's case is that since the equipment is yet to be removed from the premises, advertised and sold then the orders of August 30, 2021 cannot be said to have been overtaken by events. Reference has been made to the Supreme Court decision in *Republic Vs Ahmad Abolfathi Mohammed & Another* [2018] eKLR where the court held that;

"(23) Authorities on the necessity to punish for contempt are legion. We have considered those provided by the respondent, and also cite the following, in affirmation of the principle.

- (24) In *Econet Wireless Kenya Ltd v Minister for Information & Communication of Kenya & Another* [2005] 1 KLR 828 Ibrahim J (as he then was) relied on the Court of Appeal decision in *Gulabchand Popatlal Shah & Another Civil*



Application No 39 of 1990 (unreported), where the Court of Appeal stated as follows:

“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... In *Hadkinson V Hadkinson* (1952) 2 All ER 567, it was held that: It is the plain and unqualified obligation of every person against or in respect of whom an order is made by a court of competent jurisdiction, to obey it unless and until that 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 an order believes it to be irregular or void.”

(25) In *Att-Gen v Times Newspapers Ltd* [1974] AC 273, Lord Diplock stated:

“....There is an element of public policy in punishing civil contempt, since the administration of justice would be undermined if the order of any court of law could be disregarded with impunity.”

(26) The Court of Appeal in *AB & Another v RB*, Civil Application No 4 of 2016 [2016] eKLR cited with approval the Constitutional Court of South Africa’s decision in *Burchell v Burchell*, Case No 364 of 2005 where it was held:

“Compliance with court orders is an issue of fundamental concern for a society that seeks to base itself on the rule of law. The [Constitution](#) states that the rule of law and supremacy of the [Constitution](#) are foundational values of our society. It vests the judicial authority of the state in the court and requires other organs of the state to assist and protect the court. It gives everyone the right to have legal disputes resolved in the courts or other independent and impartial tribunals. Failure to enforce court orders effectively have the potential to undermine confidence in recourse to law as an instrument to resolve civil disputes and may thus impact negatively on the rule of law.”

(27) Ojwang, J (as he then was) in *B v Attorney General* [2004] 1 KLR 431 that:

“The court does not, and ought not to be seen to, make orders in vain; otherwise the court would be exposed to ridicule, and no agency of the constitutional order would then be left in place to serve as a guarantee for legality, and for the rights of all people.”

(28) It is, therefore, evident that not only do contemnors demean the integrity and authority of Courts, but they also deride the rule of law. This must not be allowed to happen.”



### **The Respondent's Case;**

24 In opposition, the respondent avers that on August 30, 2021 together with Icon Auctioneers and with the assistance of Kasarani Police, it complied with the orders of August 27, 2021 and prepared an inventory of all the gym equipment. That the notification of sale of movable property dated August 30, 2021 was duly signed by Inspector Boinett in compliance with the law. The respondent contends that at the time of conducting compliance of the orders of August 27, 2021, neither the respondent, its directors, its advocates nor Icon Auctioneers had been served with or was aware of any orders of injunction. The respondent case is that the ex parte orders were belatedly served upon them on August 31, 2021 way after it had secured the breaking orders thus overtaken by events.

### **Respondent's Submissions;**

25 It is the respondent's submission that the appellant has failed to prove contempt on its part as it had no knowledge of the impugned order which were issued *ex parte*. The respondent submits that from the evidence supplied, it is evident that the orders were served after it had partly complied with the breaking in orders of August 27, 2021. The respondent relied on the case of *Abdi Satarhaji & Another Vs Omar Ahmed & Another* [2018] eKLR where the Court of Appeal held that;

“Willfull disobedience of a court order cannot be imputed against a party who has no knowledge of the order in question.”

### **Analysis and Determination;**

26 Having considered the three applications, the issues for determination are;

- a. Whether the parties are entitled to the orders sought;
- b. Whether the appellant has proved contempt of court as against the respondent.

27 Appellant's Application dated August 27, 2021 seeking temporary injunction pending hearing and determination of the appeal;

Order 42 rule 6 (6) of the *Civil Procedure Rules*, 2010 empowers this court to grant a temporary injunction on terms it deems fit so long as the procedure for filing an appeal from subordinate court has been complied with. It provides thus: -

“(6) Notwithstanding anything contained in sub rule (1) of this rule the High Court shall have power in the exercise of its appellate jurisdiction to grant a temporary injunction on such terms as it thinks just provided the procedure for instituting an appeal from subordinate court or tribunal has been complied with.”

28 The principles for granting the orders of injunction were laid down by Visram J in the case of *Patricia Njeri & 3 Others V National Museum Of Kenya* [2004] eKLR where he cited with authority the Court of Appeal case of *Venture Capital & Credit Limited Vs Consolidated Bank Of Kenya Ltd* Civil Application No Nairobi 349 OF 2003 (174 OF 2003 UR) where the court held that an order for injunction pending appeal is a discretionary matter which must be “exercised judicially and not in whimsical or arbitrary fashion. The principles are as follows:

- a. The discretion will be exercised against an Applicant whose appeal is frivolous. The applicant must state that a reasonable argument can be put forward in support of his appeal.



- b. The discretion should be refused where it would inflict greater hardship than it would avoid.
- (c) The applicant must show that to refuse the injunction would render his appeal nugatory.
- (d) The court should also be guided by the principles in *Giella Vs Cassman Brown & Company Ltd* (1973) EA 358 where a successful applicant must establish that he has a prima facie case with high chances of success; that damages would not be adequate compensation if the interlocutory injunction was not granted; and that the balance of convenience should tilt in his favour.
- 29 On whether the appeal is arguable, the Court of Appeal in the case of *Dennis Mogambi Mang'are V Attorney General & 3 Others* [2012] eKLR held that:
- “An arguable appeal is not one that must necessarily succeed; it is simply one that is deserving of the court’s consideration.”
- 30 Similarly, in *Stanley Kang’ethe Kinyanjui V Tony Ketter & 5 Others* [2013] eKLR the Court of Appeal described an arguable appeal in the following terms:
- “vii). An arguable appeal is not one which must necessarily succeed, but one which ought to be argued fully before the court; one which is not frivolous.
- viii). In considering an application brought under rule 5 (2) (b) the court must not make definitive or final findings of either fact or law at that stage as doing so may embarrass the ultimate hearing of the main appeal.”
- 31 On the first limb, I have perused the draft memorandum of appeal and find that the applicant’s appeal is not frivolous as it raises arguable points, inter alia, the validity of the notice of distress and the jurisdiction of the court to issue the orders subject matter of this suit. The court cannot go into the merits of the appeal at this stage but what emerges is that the appeal is not frivolous. As stated in *Wasike V Swala* [1984] 591, an arguable appeal is not one that must necessarily succeed but one which merits consideration by the court. I am satisfied that the applicant has satisfied the requirement of arguability of the appeal.
- 32 On the nugatory aspect, as this court held in *Reliance Bank Limited V Norlake Investments Ltd* [2002]1 EA 227, the factors which render an appeal nugatory are to be considered within the circumstances of each particular case and in doing so, the court is bound to consider the conflicting claims of both sides. in the circumstances of that particular case, the court stated as follows: -
- “To refuse to grant an order of stay to the applicant would be out of proportion to any suffering the respondent might undergo while waiting for the applicant’s appeal to be heard and determined.”
- 33 In the instant application, counsel for the appellant submit that if the injunction orders sought is declined, the respondent who has locked the appellant’s premises, proclaimed its assets will proceed to sell the assets and in case the appeal succeed the sale of the assets cannot be reversed so will the loss of business and the good will from its clients. On the other hand, the respondent argues that if the application is allowed, its right to levy distress for unpaid rent which stood at Kshs 39,248,982.94 as at 31.08.2021 would be infringed leading to losses. In *African Safari Club Limited V Safe Rentals Limited*, Nairobi Civil Appeal (Application) NO 53 OF 2010 (Unreported), this Court stated:
- “...with the above scenario of almost equal hardship by the parties it is incumbent upon the court, pursuant to the overriding objective to act justly and fairly. The first role we have



undertaken in this regard is to consider the hardships of the two parties before us. The second role is to put hardship on scales...We think that the balancing act as described in the analysis of the parties before us, is in keeping with one of the principle aims of the oxygen principle of treating both parties with equality or in other words placing them on equal footing in so far as is practicable...”

- 34 I note that in the event that the appellant’s application is not granted and the respondent goes ahead to sell the equipment to settle the rent arrears and the appeal eventually succeeds, the respondent may not be in a position to return to the appellant the exact equipment or give a refund for loss of business and/or clients’ goodwill. I am in agreement with the reasoning of Justice Nyakundi in the case of Endoros Enterprises Limited (*Supra*) that like a knife that cuts both ends, the respondent equally has a legitimate expectation to earn some returns for its investments and stands to suffer losses for the unpaid rent which has fallen due. The appellant has offered to give security, this I believe, will guarantee that the respondent’s interests are protected.
- 35 From the circumstances of the application before me, I am satisfied that the applicant has satisfied the twin principles for the grant of temporary injunction pending the hearing and determination of the intended appeal in accordance with the jurisprudence underlying the consideration of the twin principles summarized by this Court in the case of Stanley Kange’the Kinyanjui (*supra*).

**Respondent’s application dated 01/09/2021 seeking to have the orders of 30/08/2021 discharged and or setting aside.**

- 36 Having made the above determination, it follows then that the Respondent’s application dated September 1, 2021 cannot stand. The respondent in its application dated September 1, 2021 seeks to have the ex parte orders of August 30, 2021 and all consequential orders discharged and/or set aside. The respondent’s case is that the order issued in favour of the appellant has been overtaken by events as Icon Auctioneers had already effected the breaking in orders on August 30, 2021 as sanctioned by the lower court orders of August 27, 2021. The respondent contends that the appellant has failed to disclose that vide ruling of October 13, 2020, which orders are still force, it was required to continue paying rent as and at when it fell due. The respondent further deposes that the appellant has failed to comply with the orders of October 13, 2021 and has rent and service charge expense arrears of Kshs 39,248,982.94 as at August 31, 2021. Non-disclosure of facts was discussed in *Bahadurali Ebrahim Shamji V Al Noor Jamal & 2 Others* CIVIL APPEAL NO 210 OF 1997 where the Court of Appeal stated as follows: -

“It is perfectly well-settled that a person who makes an ex parte application to the court – that is to say, in the absence of the person who will be affected by that which the court is asked to do – is under an obligation to the court to make the fullest possible disclosure of all material facts within his knowledge, and if he does not make the fullest possible disclosure then he cannot obtain any advantage from the proceedings, and he will be deprived of any advantage he may have already obtained. It has been for many years the rule of court, and one which it is of the greatest importance to maintain, that when an applicant comes to the court to obtain relief on an ex parte statement he should make a full and fair disclosure of all the material facts – facts, not law. He must not misstate the law if he can help it – the court is supposed to know the law. But it knows nothing about the facts, and the applicant must state fully and fairly the facts, and the penalty by which the court enforces that obligation is that if it finds out that the facts have not been fully and fairly stated to it, the court will set aside any action which it has taken on the faith of the imperfect statement...In considering whether or not there has been relevant non-disclosure and what consequence the court should attach



to any failure to comply with the duty to make full and frank disclosure, the principles relevant to the issues in these appeals appear to include; (i) The duty of the applicant is to make full and fair disclosure of the material facts. (ii) The material facts are those which it is material for the judge to know in dealing with the application made; materiality is to be decided by the court and not the assessment of the applicant or his legal advisers. (iii) The applicant must make proper inquiries before making the application. The duty of disclosure therefore applies not only to material facts known to the applicant but also to any additional facts which he would have known if he had made sufficient inquiries. (iv) The extent of the inquiries which will be held to be proper, and therefore necessary, must depend on all the circumstances of the case including (a) the nature of the case which the applicant is making when he makes the application, (b) the order for which the application is made and the probable effect of the order on the defendant, and (c) the degree of legitimate urgency and the time available for the making of the inquiries. (v) If material non-disclosure is established the court will be astute to ensure that a plaintiff who obtains an *ex parte* injunction without full disclosure is deprived of any advantage by that breach of duty. (vi) Whether the fact not disclosed is of sufficient materiality to justify or require immediate discharge of the order without examination of the merits depends on the importance of the fact to issues which were to be decided by the judge in the application. (vii) Finally, it is not every omission that the injunction will be automatically discharged. A *locus penitentiae* (chance of repentance) may sometimes be afforded. The Court has a discretion, notwithstanding proof of material non-disclosure which justifies or requires the immediate discharge of the *ex parte* order, nevertheless to make a new order on terms: when the whole of the facts, including that of the original non-disclosure, are before it, the court may well grant such a second injunction if the original non-disclosure was innocent and if an injunction could properly be granted even had the facts been disclosed...”

37 The appellant has opposed this application and stated that for the purpose of obtaining the orders of injunction pending appeal, it revealed all the relevant facts. According to the appellant, the facts relating to the interim injunction pending inter partes hearing as well as the orders of October 13, 2021 were irrelevant facts in the determination of the application dated August 27, 2021.

38 In the present application, I am convinced that the material non-disclosure as outlined by the respondent, although substantial, does not affect and or change this court’s position on the injunctive orders issued on August 30, 2021. The orders sought by the appellant was to conserve the subject matter of the suit having filed the appeal, the main issues in dispute is yet to be heard and determined. For this reason, this court is not convinced to set aside or discharge the orders of August 30, 2021 in favour of the appellant. The respondent obtained breaking orders on 27/8/2021. This court issued interim orders on 30/8/2021. The appellant equipment could not have been sold in less than four (4) days.

**Appellant’s application dated 9/09/2021 seeking the respondent be cited for contempt of court;**

39 Contempt of court is that conduct or action that defies or disrespects authority of court. *Black’s Law Dictionary* 9<sup>th</sup> Edition, defines contempt as:

“The act or state of despising; the conduct of being despised. Conduct that defies the authority or dignity of a court or legislature. Because such conduct interferes with the administration of justice.”



40 The *Contempt of Court Act* No 46 of 2016 was declared constitutionally invalid and nullified in 2018 by Justice Chacha Mwita In the case of *Kenya Human Rights Commission V Attorney General & 2 Others* [2018] eKLR. Consequently, the courts have since reverted back to the applicable law as regards contempt of court that existed before the enactment of the *Contempt of Court Act*. The applicable law was restated by the Court of Appeal in the case of *Christine Wangari Gachege Vs Elizabeth Wanjiru Evans & 11 Others*, [2014] eKLR where the court found that the English law on committal for contempt of court under rule 81.4 of the English Civil Procedure Rules, which deals with breach of judgment, order or undertakings, was applied by virtue of section 5(1) of the *Judicature Act* which provided that:

“The High Court and the Court of Appeal shall have the same power to punish for contempt of court as is for the time being possessed by the High Court of Justice in England, and that power shall extend to upholding the authority and dignity of subordinate courts.”

41 Order 40 rule (3) of the *Civil Procedure Rules*, 2010 provides that in cases of disobedience, or of breach of any terms of a temporary injunction, the court granting that injunction may order the property of the person guilty of such disobedience or breach to be attached, and may also order such person to be detained in prison for a term not exceeding six months unless in the meantime the court directs his release. This application has therefore invoked this court’s powers in terms of order 40 rule (3).

42 The present application seeks to have the respondent cited for contempt of this court’s order of temporary injunction granted August 30, 2021 and, have its directors and the auctioneers committed to civil jail, fined or have sanctions imposed upon them as the court may deem fit. The respondent has vehemently opposed the said application and deposed that the same was overtaken by events as they had already initiated the execution process in compliance with the court orders of August 27, 2021 when it was served with the court order in question.

43 In *Econet Wireless Kenya Ltd V Minister For Information & Communication Of Kenya & Another* [2005] KLR 828, Ibrahim, J underscored the importance of obeying court orders and held that:

“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.”

44 In *Samuel Mn Mweru & Others V National Land Commission & 2 Others* [2020] eKLR, Justice Mativo citing the High Court of South Africa case of *Kristen Carla Burchell Vs Barry Grant Burchell*, EASTERN CAPE DIVISION CASE NO 364 OF 2005 outlined the principles that ought to be proved in a contempt proceeding and stated;

“It is an established principle of law that in order to succeed in civil contempt proceedings, 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.”



- 45 Similarly, in the Supreme Court of India in *Mabinderjit Singh Bitta V Union Of India & Others* 1 A NO 10 of 2010 (October 13, 2011) it was held that:
- 46 In exercise of its contempt jurisdiction, the courts are primarily concerned with enquiring whether the contemnor is guilty of intentional and willful violation of the order of the court, even to constitute a civil contempt. Every party is before the court and even otherwise, is expected to obey the orders of the court in its spirit and substance. Every person is required to respect and obey the orders of the court with due dignity for the institution. (Emphasis).
- 47 In *carey v laiken*, 2015 SCC 17 (April 16, 2015), Cromwell J, writing for the Supreme of Canada expounded on the three elements of civil contempt of court which must be established to the satisfaction of the court, thus:
- i) The order alleged to have been breached “must state clearly and unequivocally what should and should not be done.” This ensures that a party will not be found in contempt where an order is unclear. An order may be found to be unclear if, for example, it is missing an essential detail about where, when or to whom it applies; if it incorporates overly broad language; or if external circumstances have obscured its meaning.
  - ii) The party alleged to have breached the order must have had actual knowledge of it. It may be possible to infer knowledge in the circumstances, or an alleged contemnor may attract liability on the basis of the willful blindness doctrine.
  - iii) The party alleged to be in breach must have intentionally done the act that the order prohibits or intentionally failed to do the act that the order compels.
- 48 The emphasis as shown in the above cases is that there must be “willful and deliberate disobedience of court orders.” There cannot be deliberate and willful disobedience, unless the contemnor had knowledge of the existence of that order. And because contempt is of a criminal nature, it is always important that breach of the order be proved to the required standard; first, that the contemnor was aware of the order having been served or having personal knowledge of it, and second; that he deliberately and willfully disobeyed it. In *Peter K Yego & Others V Pauline Wekesa Kode*, (ACC NO 194 OF 2014), A the court stated that “it must be proved that one had actually disobeyed the court order before being cited to contempt.”
- 49 In the present case, it is not disputed that the court order subject of this application was granted on August 30, 2021 and service of the same was effected on the respondent, its advocates and the auctioneers on August 31, 2021. A perusal of the replying affidavit and the evidence thereto, reveal that the respondent moved to comply with the breaking in orders of August 27, 2021 on the August 30, 2021 and made an inventory of the proclaimed equipment. It is evident that at the time of proclamation, the respondent was not aware of the orders issued by this court and had partly complied with the breaking in orders and it is clear that the respondent has not continued with the advertisement and sale of the equipment. Applying the principles discussed herein to the facts of this case, I am not persuaded that the appellant has demonstrated that the respondent willfully failed, refused and or neglected to obey the court order.
- 50 The appellant has not sufficiently demonstrated that the respondent deliberately disobeyed court orders or at all. contempt proceedings are a serious undertaking because a court exercising this jurisdiction is minded to ensure the orderly functioning of society and the rule of law. On conviction, the alleged contemnor stands to lose his or her liberty. It should not, therefore, be taken lightly. Taking into account the circumstances of this case and the material placed before court, I am not satisfied



that the appellant has proved its case to the required standard. Consequently, the application dated September 9, 2021 is declined and dismissed.

**Final Disposition;**

1. That the appellant's application dated August 27, 2021 is allowed on condition that the appellant do deposit the sum of Kshs 14,272,321.27, being the decretal amount being proclaimed, to the respondent within thirty (30) days from the date of the ruling failure to which the respondent shall be at liberty to advertise and put the proclaimed assets on sale.
2. That the appellant do pay the auctioneers fees of Kshs 650,000 within Forty-Five (45) days from the date of this ruling.
3. That the respondent's application dated September 1, 2021 is hereby dismissed.
4. That the appellant's application dated September 9, 2021 is hereby dismissed.
5. In default of paying the sum of Kshs 14,272,321/27 within thirty(30) days as ordered hereinabove, the respondent shall be at liberty to levy distress.
6. The appellant to pay all the rent arrears within ninety (90) days hereof and in default the respondent shall be at liberty to levy distress.
7. The tenant shall continue paying the monthly rent as it settles the amounts in order one (1) and six (6).
8. That costs of all the application shall be in the cause.

**DATED AND SIGNED AT NAIROBI THIS 18<sup>TH</sup> DAY OF MAY 2022**

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**S. CHITEMBWE**

**JUDGE**

Dated, Signed and delivered at Nairobi this 31<sup>st</sup> day of May 2022

.....

**J.K. SERGON**

**JUDGE**

