



**Owuor v Northwave Credit Limited & 2 others (Miscellaneous Application E750 of 2021)
[2022] KEHC 12043 (KLR) (Commercial and Tax) (19 August 2022) (Ruling)**

Neutral citation: [2022] KEHC 12043 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX**

MISCELLANEOUS APPLICATION E750 OF 2021

A MABEYA, J

AUGUST 19, 2022

BETWEEN

ERIC OTIENO OWUOR APPLICANT

AND

NORTHWAVE CREDIT LIMITED 1ST RESPONDENT

PETER NYAKI NJAGI 2ND RESPONDENT

MERCY NKIROTE KINOTI 3RD RESPONDENT

RULING

1. This is a ruling on an application dated 27/10/2022. The same was brought under order 52 rule 3(1) of the *Rules of the Supreme Court of England* and section 5(1) of the *Judicature Act*.
2. The applicant sought that the respondents be found to be in contempt of court for disobeying the order of October 12, 2021 and consequent thereto be punished appropriately for the said contempt.
3. The application was predicated upon the grounds that the court issued an interim injunction barring the 1st respondent and its agents from advertising for sale, selling and/or handling in any way motor vehicles registration numbers KCM 284W and KCL 448A ('the vehicles'); that the order was served upon the 1st respondent via email and through a hard copy on October 13, 2021.
4. That nonetheless, the 1st respondent proceeded to sell the vehicles via auction on October 18, 2021 to John Gitumbi Muriuki and John Irungu Munjiru, respectively.
5. The applicant averred that the 1st respondent's actions of selling the vehicles days after being served with a valid court order are unconscionable, unjustifiable and a violation of the said court order.



6. In response to the application, the 2nd respondent swore a replying affidavit dated November 10, 2021 on behalf of the 1st and 3rd respondent.
7. It was averred that the applicant had failed to service the loan in terms of the agreement entered into with the 1st respondent. That necessitated the 1st respondent to initiate the recovery process through Vetrack Investment auctioneers. That the applicant made attempts to transfer the security motor vehicles to a third party without informing the 1st respondent in a bid to defeat its right to realise the securities, actions which amounted to fraud as per the contract and warranted immediate recall of the entire loan.
8. That the aforementioned auctioneers subsequently issued the applicant with the proclamation notice and obtained orders from the Chief Magistrate's Court Milimani seeking police assistance during repossession. The said orders were granted on 8/10/2021 and the said auctioneers advertised and sold the vehicles on October 18, 2021.
9. That the 1st respondent was physically served with the applicant's application before this court dated 8/10/2021 and court orders of October 13, 2021 on October 25, 2021. That therefore at the time of the sale of the vehicles the respondents had no knowledge of either the application or the subsequent orders issued since it had not been served with the same.
10. The court has considered the record entirely. The crux of the matter is whether the respondents were in breach of the court order of October 12, 2021 and if so what penalty should be meted.
11. It is not in dispute that this court issued an order on October 12, 2021 restraining the 1st respondent and its agents from advertising for sale, selling or handling in any way the vehicles pending the determination of the applicant's application dated 1/10/2021 in Nairobi CM COMM No E1363 of 2021: Eric Otieno Owour vs Northwave Credit Limited. That order was interim in nature.
12. The applicant's produced evidence of service of the said order upon the respondents as annexures 'E003' and 'E004'. Service is shown to have been via email on 13/10/2021. It was never denied that the email through which the service was effected belonged to the respondents.
13. The 1st respondent argued that it was physically served with the order on October 25, 2021 and that the applicant had not tendered any evidence to show that the order was served upon it. However, the court notes that the respondent did not seek the attendance of Jackson Muema Kisinga who swore the affidavit of service dated October 28, 2021 for cross examination.
14. In any event, the court notes that the applicant's amended application dated October 22, 2022 was served upon the 1st respondent via the same email address that was used to effect service of the order upon the 1st respondent. The 1st respondent was able to receive that amended notice of motion and respond to it. This is also proof that the 1st respondent received the order of October 13, 2021 but ignored it.
15. The court finds that the detailed affidavit of service dated October 28, 2021 was not displaced. There is sufficient evidence on record to show that the 1st respondent was properly served in accordance with the law. It was not necessary for personal service. All that was required was to show that the respondents were made aware of the order. This the applicant succeeded in showing.
16. Despite being served with the subject order, and being aware of both the order and the proceedings herein, the 1st respondent went ahead to sell the vehicles via auction on October 18, 2021, 5 days after service of the said order.



17. The upshot of the above is that the respondents disregarded the order of this court made on October 13, 2021 and are in contempt of court. They are found to be in contempt thereof and are convicted accordingly.
18. The applicant sought the nullification of the subject sale. The third party to whom the vehicles were sold was never enjoined in these proceedings. In this regard, that order cannot be made without that party being heard.
19. Accordingly, the application is allowed as follows: -
 - a) The court hereby finds all the respondents to be in contempt of the order of this court made on October 13, 2021.
 - b) All of the respondents are hereby summoned to appear before court physically on 20/9/2022 for mitigation and sentencing.
 - c) Cost are awarded to the applicant.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 19TH DAY OF AUGUST, 2022.

A. MABEYA, FCI Arb

JUDGE

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