



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KISII**

**CIVIL APPEAL NO 21 OF 2020**

**WILFRED MACHANA.....1<sup>ST</sup> APPELLANT**

**BHAVESH NEMCHAND HARIA.....2<sup>ND</sup> APPELLANT**

**VERSUS**

**EVANS N NYAKWARA.....1<sup>ST</sup> RESPONDENT**

**PATRICK OMARE T/A BAMA AUCTIONEERS.....2<sup>ND</sup> RESPONDENT**

***(Being an appeal from the ruling and orders Hon. S. N. Makila SRM***

***delivered on the 25<sup>th</sup> October 2019 in Kisii CMCC NO 534 OF 2017)***

**JUDGMENT**

1. Before me is an interlocutory appeal challenging a Ruling dated 25<sup>th</sup> October, 2019 by *Hon. S. N. Makila SRM* determining the appellants' application dated 10<sup>th</sup> September 2019.
2. In order to place the appeal in context, a brief background of the facts is necessary. The genesis of the dispute was a road traffic accident involving the 1<sup>st</sup> respondent and the Motor Vehicle Reg No KBU 579X belonging to the 2<sup>nd</sup> appellant which was being driven by the 1<sup>st</sup> appellant. The trial magistrate found the appellants liable and awarded the 1<sup>st</sup> respondent damages of Kshs 298,592/- less 20% contribution proscribed.
3. The appellants filed a notice of motion before the trial court on 28<sup>th</sup> August 2019 seeking the review of the judgment and decree. The appellants also sought interim stay of execution of the decree pending the determination of the review application. The subordinate court upon hearing the application issued temporary orders of stay of execution pending determination of the application seeking revision of the judgment.
4. The appellants then served the respondents with the order of stay. The appellants contend that the 1<sup>st</sup> respondent despite being served with the orders of stay, instructed the 2<sup>nd</sup> respondent to sell motor vehicle KCH 458K including that goods that were in it contrary to the court orders.
5. The appellants thus filed their application dated 10<sup>th</sup> September 2019 before the trial court seeking to commence contempt proceedings against the 2<sup>nd</sup> respondent and that the 2<sup>nd</sup> respondent be committed to civil jail for a period of 6 months for disobeying orders issued on 30<sup>th</sup> August 2019.
6. The appellants in their application before the trial court also sought to have motor vehicle KCH 458K released and the 1<sup>st</sup> respondent or his agents be restrained from selling the motor vehicle through public auction.
7. The trial magistrate dismissed the appellants' application dated 10<sup>th</sup> September 2019 with costs to the respondents. The appellants being dissatisfied with the decision of the subordinate court, filed a Memorandum of Appeal on 8<sup>th</sup> June 2021 raising the following grounds;

***1. The learned trial magistrate erred in law and in fact finding that the auctioneer was not in contempt of the court orders issued on 28<sup>th</sup> September 2019 and served upon the auctioneer on 30<sup>th</sup> September 2019, but nevertheless proceeded to detain the motor***

vehicle attached in regard of the orders of stay of execution issued on 28<sup>th</sup> September 2019.

2. The learned trial magistrate erred in law in review considering an application which had not been argued before her thereby dismissing the said application without considering the facts presented in support of the said application.

3. In considering the application for review dated 26<sup>th</sup> August without hearing parties, the learned trial magistrate erred in law in taking judicial notice that insurance companies conduct own investigations prior to instructing counsel on behalf of counsel when the issue was not pleaded before her and considering the fact that the issue is not of public notice and/or embedded in legal dogma.

4. The learned trial magistrate erred in law and fact by making adverse comments against a party (insurance company) who was not a party in the proceedings thereby ending up with a wrong decision revisiting the mistake and/or omission of the insurer upon the appellant.

5. The learned trial magistrate erred in law and fact in failing to appreciate fact in that there was a new piece of evidence on multiplicity of the police abstracts emanating from a single occurrence book recording which was not adduced during the hearing of the case and which would have affected the final decision, judgment and decree in the matter.

8. This court directed that the appeal be dispensed by way of written submissions and both parties complied.

9. **Mr. Begi**, counsel for the appellants in his submissions abandoned all the grounds it raised in the memorandum on appeal and submitted on one issue, that is, whether the dismissal the application dated 3<sup>rd</sup> September 2019 was proper. It was submitted that the ruling of the court delivered on 25<sup>th</sup> October 2019 not only dealt with the application for contempt dated 10<sup>th</sup> September 2019 it also proceeded to determine the application for review dated 3<sup>rd</sup> September 2019.

10. **Miss Sagwa**, counsel for the respondents raised two issues, whether the trial magistrate correctly dismissed the application on contempt of court orders before her and whether the appellants proved a case for review of judgment.

11. On the first issue it was submitted that there was no disobedience on the part of the auctioneer as the orders staying the execution were served after the auctioneer had already attached the appellant's motor vehicle. Miss Sagwa further submitted that in an application for review the appellants were not only expected to prove discovery of new evidence but must also show that they did not have the evidence in their possession at the time despite being diligent. It was submitted that the appellants did not prove any ground for review.

#### **ANALYSIS AND DETERMINATION**

12. The application against the respondents on contempt of court orders was brought under the **sections 6 (c) and 7 of the Contempt of Court Act**. In **St Mary Academy Limited & another v Grace Njeri Mukora & another; Yvonne Jeruto & another (Contemnors) [2021] eKLR** the applicant's application was brought under **section 4, 5, 27 and 28 of the Contempt of Court Act 46 of 2016**. The Court considered the finding in **Kenya Human Rights Commission v Attorney General & another [2018] eKLR** declaring the Act unconstitutional and held that although the application was brought under incorrect provisions of the law, recourse would have to be the provisions of the **Judicature Act**.

13. **Section 5(1) of the Judicature Act** provides 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.”*

14. However, the application was before magistrate's court and thus **section 5 (1) of the Judicature Act** would be inapplicable as it applies to matters before the High Court and Court of Appeal. The appellant's application dated 10<sup>th</sup> September 2019 was brought under incorrect provisions of the law, the trial magistrate ought to have considered provisions of the **Magistrate's Act No. 46 of 2016**.

15. **Section 10(3) of the Magistrate's Courts Act** provides as follows;

(1) Subject to the provisions of any other law, the court shall have power to punish for contempt.

(2) ...

(3) In the case of civil proceedings, the willful disobedience of any judgment, decree, direction, order, or other process of court or willful breach of an undertaking given to a court constitutes contempt of court.

(4) ...

(5) ....

(6) The court may sentence a person who commits an offence under Sub-Section (1) to imprisonment for a term not exceeding five

days, or a fine not exceeding one hundred thousand shilling or both;”

16. The appellants were therefore to prove that the respondent’s willfully disobeyed the court orders, however, the appellants failed to do so. The respondents established that the orders were served on them at 12:50 p.m. after motor vehicle KCH 458K had been attached at 9:00 a.m. and this could only mean that they were not in contempt of court orders.

17. Even if this court was to assume that the appellant’s proved the elements contained in **section 10(3) of the Magistrate’s Court Act**, the trial court can only commit contemnors to imprisonment of a term not exceeding 5 days and therefore the prayer to commit the respondents to 6 months imprisonment would not be tenable.

18. I therefore find in the circumstance that the trial magistrate correctly found that the respondents were not in contempt of its orders.

19. I now turn to consider whether the trial magistrate considered the application dated 26<sup>th</sup> August 2019 in its ruling of 25<sup>th</sup> October 2019.

20. The application before the court was dated 10<sup>th</sup> September 2019 and did not seek any order for the review of the subordinate court’s judgment. From the proceedings there is no evidence that the application dated 26<sup>th</sup> August 2019 and that dated 10<sup>th</sup> September 2019 were consolidated.

21. The trial magistrate however, in her Ruling addressed the issues raised in the application dated 26<sup>th</sup> August 2019 as follows:

*“On whether the applicants have shown sufficient cause for setting aside this court’s judgment.....*

.....

*The requirements of under Order 45 (1) of the Civil Procedure Rules have not been met by the applicants. I decline to grant the orders for review and/or setting aside the judgment herein.”*

22. The subordinate court therefore ought to have only considered the application that had been placed before it by the parties. The application dated 26<sup>th</sup> August 2019 and filed on 28<sup>th</sup> August 2019 could not have been resolved without a fair and public hearing before the trial court as encompassed under **Article 50 of the Constitution of Kenya**.

23. In the end, I find that the appeal is partly merited and the decision of the trial magistrate to decline the orders of review without granting both parties a fair hearing is set aside.

24. The appellant shall have half the cost of this appeal.

**DATED, SIGNED AND DELIVERED AT KISII THIS 29TH DAY OF OCTOBER, 2021.**

**R. E. OUGO**

**JUDGE**

**In the presence of:**

<b>Appellant</b>	<b>Absent</b>
<b>Miss Sagwe</b>	<b>For the Respondent</b>
<b>Ms. Rael</b>	<b>Court Assistant</b>