



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT KISII**  
**CIVIL CASE NO. 34 OF 2015**

**JULIUS MOGAKA GEKONDE T/A**

**E-SMART TECHNICAL COLLEGE.....APPLICANT/PLAINTIFF**

**VERSUS**

**OURU POWER LIMITED .....1<sup>ST</sup> DEFENDANT**

**JOSEPH O. NYACHOTI T/A MINMAX AUCTIONEERS.....2<sup>ND</sup> DEFENDANT**

**RULING**

1. In the application dated 16<sup>th</sup> March 2016, the plaintiff herein sought orders for, inter alia; **“that this court do find that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants/Respondents are guilty for disobedience and are in breach of a court order having disobeyed this courts orders made on 7<sup>th</sup> March, 2016 by refusing to release motor vehicle Registration Number KBY 187A ISUZU Bus upon service of the order to them.”** In a ruling delivered on 7<sup>th</sup> December 2016, this court found the 2<sup>nd</sup> defendant herein guilty of contempt of court and directed that he appears in court on 8<sup>th</sup> February 2017 to show cause why appropriate action should not be taken against him in light of the disobedience of a lawful court order.

2. On 8<sup>th</sup> February, 2017 the case was mentioned before me when Mr. Odero advocate who appeared on behalf of Mr. Mainga, for the 2<sup>nd</sup> defendant informed the court that the 2<sup>nd</sup> defendant was taken ill and was unable to attend court to show cause why he should not be punished for contempt of court. The court then adjourned the case to 21<sup>st</sup> February, 2017 on account of the 2<sup>nd</sup> defendant’s alleged illness.

3. On 21<sup>st</sup> February, 2017, Mr. Oguttu advocate for the 2<sup>nd</sup> defendant informed the court that there were certain intervening and crucial factors that the court needed to consider before the 2<sup>nd</sup> defendant, who was then present in court, could be asked to show cause why he cannot be punished for disobeying a lawful court order. Mr. Oguttu then informed the court that the 2<sup>nd</sup> defendant had since filed an appeal before the Court of Appeal at Kisumu being appeal No. 14 of 2017 in which he challenges the impugned ruling of 7<sup>th</sup> December, 2016. Mr. Oguttu further stated that following the filing of the said appeal, the 2<sup>nd</sup> defendant had on 17<sup>th</sup> February 2017 also filed a Notice of Motion application, under certificate of urgency, before the Court of Appeal in which he sought an order of stay of execution of this court’s impugned orders of 7<sup>th</sup> December 2016, pending the outcome of the appeal.

4. According to Mr. Oguttu, the impugned orders of this court made on 7<sup>th</sup> December, 2016 are under challenge and therefore the doctrine of *lis pendens* should be invoked to stay any adverse action against the 2<sup>nd</sup> defendant. He further informed the court that the defendants have lodged another application

before this court seeking the suspension of any further proceedings so as to await the outcome of the case pending before the Court of Appeal. Mr. Oguttu also argued that even though this court has inherent powers to punish a litigant who has been found guilty of contempt of court, such powers to punish should not be exercised at all costs despite the pending proceedings in the Court of Appeal.

5. On his part, Mr. Ombachi learned counsel for the plaintiff submitted that the matter before the court was for the 2<sup>nd</sup> defendant to show cause why he should not be punished for disobedience of a court order and therefore, the filing of an appeal cannot bar the court from proceeding with the motion at hand. He argued that there is no order from the Court of Appeal staying the proceedings before this court and that in line with the provisions of **Order 42 Rule 6 (1) of the Civil Procedure Rules**, this court should proceed with the notice to show cause without any hindrance. Mr. Ombachi argued that the 2<sup>nd</sup> defendant had no right of audience before this court by virtue of his being in contempt of court until he purges the said contempt. He emphasized that court orders ought to be obeyed irrespective of what a party thinks of the said order.

6. Mr. Gekonde, learned counsel for the objectors concurred with the submissions of Mr. Ombachi for the plaintiff and added that the defendants' counsel's submissions were an attempt to hoodwink the court and steer it off the course of what was actually coming up before it, which was for the contemnor to show cause why he should not be punished for disobeying the court order of 7<sup>th</sup> March 2016. Mr. Gekonde added that no orders of stay of execution had been issued before the Court of Appeal and therefore, this court should proceed and ask the 2<sup>nd</sup> defendant to show cause.

7. In a rejoinder, Mr. Oguttu drew the court's attention to the application that he had filed on the same day, 21<sup>st</sup> February 2017, in which he had attached all the pleadings filed before the Court of Appeal to demonstrate that said appeal existed. Mr. Oguttu further argued that the fact that the 2<sup>nd</sup> defendant was present in court and ready to show cause was itself proof that he had right of audience. He further added that when a litigant exercises a right of appeal he automatically has a right of audience. Mr. Oguttu urged this court to suspend the notice to show cause proceedings for a fortnight to await the outcome of the stay of execution application before the Court of Appeal.

8. I have anxiously considered the rival submissions tendered by the parties' respective advocates in this matter. What started as a mention for the purposes of the 2<sup>nd</sup> defendant showing cause why he should not be punished for disobeying a court order snowballed into a fully fledged "application" of sorts in which the 2<sup>nd</sup> defendant sought the suspension of the said show cause proceedings pending the outcome of an application for stay of execution pending appeal.

9. The question which then arises is whether the 2<sup>nd</sup> defendant, who is for all intents and purposes, a contemnor, has a right of audience before this court in the first place. The Court of Appeal grappled with, and explored the same question in the case of **Rose Detho vs Rahlal Automobiles Ltd & 6 others NRB Court of Appeal CA 304/2006**, wherein Githinji JA, speaking for the majority stated as follows on the right of the contemnor to be heard:

***"The general rule that a party in contempt could not be heard or take part in the proceedings in the same case until he has purged his contempt applies to proceedings voluntarily instituted by himself in which he has made some claim and not a case where he seeks to be heard in respect of some matter of defence or where he has appealed against an order which he alleges to have been illegal having been made without jurisdiction... "***

10. The Court of Appeal further stated that:-

***"...the court's power when deciding whether to hear a contemnor or not is discretionary, the general rule has been not to hear a contemnor until he purges the contempt ....Much as I have the discretion to hear or not to hear the applicant, that discretion, like any other judicial discretion, must be exercised upon reasons and not on the whims of the court or on sympathy or sentimental aspects such as the court must show that it has teeth when faced with a case such as***

***before us. Of course, courts have teeth but must only bite in appropriate circumstances. Courts act on reason and not on emotions.”***

11. In the instant case, the application by the 2nd defendant is for this court to suspend its proceedings pending the determination of an application for stay of execution filed in the Court of Appeal. The 2nd defendant did not present a formal application in court to canvass his prayer for the suspension of these proceedings and this application was presented orally from the bar at the time the case came up for mention for the 2nd defendant to show cause why he cannot be punished for being in contempt of a court order. To my mind, and as correctly observed by Mr. Gekonde counsel for the objector, the oral application made by Mr. Oguttu counsel for the 2nd defendant seeking to suspend the proceedings in this matter pending the outcome of an application before the Court of Appeal is an attempt to hoodwink this court in order to steer it off the course of the matter/business that is at hand, which is the notice to show cause. Even though it is apparent that the impugned orders of 7th December, 2016 have been challenged through an appeal, the said orders are still valid and have not been stayed, varied, set aside or discharged.

12. Order 42 Rule 6(1) of the Civil Procedure Rules stipulates as follows:

**"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."**

13. The appeal and the application before the Court of Appeal are yet to be determined. What is at hand before this court is that an order issued by this court was not complied with and the contemnor is to show cause why he should not be punished for contempt. I will reiterate the sentiments of Romer LJ in **Hadkinson -v- Hadkinson (1952) P 285 at 288** that:-

***"It is 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" (Emphasis added)***

14. Mr Oguttu cited the doctrine of *lis pendens* as being applicable in this case and argued that this court should consider the pending matters before the Court of Appeal to be a bar to proceedings in this case. The ***Blacks Law Dictionary, 9<sup>th</sup> Edition***, has defined *lis pendens* as the jurisdiction, power or control acquired by a court over property while a legal action is pending.

15. *Lis pendens* is a common law principle that was incorporated under section 52 of the Indian Transfer of Property, 1882 (now repealed) The section provides as follows:

**"During the active prosecution in any court having authority in British India by the Governor General in Council, of a contentious suit or proceeding in which any right to immovable property is directly and specifically in question, the property cannot be transferred or otherwise dealt with by any party to the suit or proceeding so as to affect the rights of any other party thereto under any decree or order which may be made therein, except under the authority of the court and on such terms as it may impose."**

16. Going by the above definition of the doctrine of *lis pendens*, I find that it has no relevance to the instant case as there is no immovable property, over which this court intends to acquire control while this action is pending.

17. Taking a cue from the decisions in the above quoted authorities, I find that oral application made to

this court by the 2<sup>nd</sup> defendant to suspend its proceedings is misplaced, irregular and amounts to backdoor attempt geared at derailing this court's proceedings so as to obtain orders of stay of proceedings pending the outcome of another application at the court of Appeal under the guise of a suspension. I decline to issue the orders sought and direct that the 2<sup>nd</sup> defendant proceeds to show cause why he should not be punished for disobeying the orders of 7th March, 2016.

18. It is so ordered.

**Dated, signed and delivered in open court this 24<sup>th</sup> day of February, 2017**

**HON. W. A OKWANY**

**JUDGE**

**In the presence of:**

- Mr. Ombachi for the plaintiff
- Mr. Oguttu for the 1<sup>st</sup> and 2<sup>nd</sup> Defendants
- Omwoyo: court clerk