



**Officer Commanding Webuye Weighbridge Police Station &
another v West Kenya Sugar Company Limited (Civil Appeal
E070 of 2023) [2025] KEHC 4449 (KLR) (4 April 2025) (Judgment)**

Neutral citation: [2025] KEHC 4449 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
CIVIL APPEAL E070 OF 2023**

AC BETT, J

APRIL 4, 2025

BETWEEN

**THE OFFICER COMMANDING WEBUYE WEIGHBRIDGE POLICE
STATION 1ST APPELLANT**

KENYA NATIONAL HIGHWAY AUTHORITY 2ND APPELLANT

AND

WEST KENYA SUGAR COMPANY LIMITED RESPONDENT

*(Being an appeal the Ruling and Orders of Hon. R. S. Kipng'eno (Principal
Magistrate) in Butali Misc. Civil Application No. E008 of 2023 delivered on 3rd
May 2023 and Orders of 28th April 2023, 3rd May 2023 and 5th May 2023)*

JUDGMENT

Background

1. On 14th April 2023, Interways Works Ltd, which is contracted by the 2nd Appellant to manage, operate and maintain its Webuye Weighbridge Station, intercepted the Respondent's motor vehicle registration number KDE 585 S which was ferrying cane sugar and upon weighing the scale, found it to have been overloaded on the Gross Vehicle Weight by 1,200 Kgs in that it was carrying 51,200 Kgs instead of 50,000 Kgs. The vehicle was further found to have an overload on the axle of 3,420 Kgs having carried 28,620 Kgs instead of its permissible limit of 25,200 Kgs.
2. Upon establishing that the suit truck was overloaded, the Respondent was served with an overload fees invoice requiring him to pay a penalty of Ksh. 100,838/= failure to which the 1st Appellant would detain the motor vehicle and parking fees would be charged at USD 50/= per day after 3 days. The Respondent did not settle the invoice prompting the 1st Appellant to detain the motor vehicle which was still loaded with cane sugar.



3. The Respondent was aggrieved and filed a Miscellaneous application dated 25th April 2023 in which it was seeking orders to compel the Appellants to release the suit motor vehicle Registration Number KDE 585 S which had been detained at Webuye Weighbridge over allegations of being overloaded. According to the Respondent, the subject motor vehicle had been re-weighed and found to be within the prescribed load limits but the Appellants refused to release the motor vehicle even after being served with an interim order yet the cargo loaded onto the trailer was perishable.
4. The application was premised on Sections 1A and 1B of the *Civil Procedure Act* and Order 40 Rule (2) and (4) of the Civil Procedure Rules and in it, the Respondent made the following prayers:-
 1. That this Application be certified urgent.
 2. That service of the Application be dispensed with in the first instance.
 3. That pending the Hearing and determination of this application, this Honourable Court be pleased to grant an injunction compelling the Respondents/Respondent or its employees, officers, agents or servants more specifically the Officer Commanding Webuye weighbridge Police Station to release the motor vehicles registration number KDE 585 S to the Applicant.
 4. That the Honourable Court be pleased to grant an injunction compelling the Respondents or its employees, officers, agents or servants more specifically the Officer Commanding Webuye Weighbridge Police Station to release the motor tractor registration number KDE 595 S to the Applicant.
 5. That the costs of the Application be provided for.
5. Pursuant to the application, the trial court issued a mandatory injunction ex parte, on 25th April 2023 and set the inter partes application for hearing on 16th May 2023.
6. It appears that the Appellants did not release the suit motor vehicle as ordered by court despite being served with the order and on 27th April 2023, the Respondent filed contempt proceedings seeking to commit the 1st Appellant to jail for a period of six months or such a time as the court would deem fit and just in the circumstances. Secondly, the Respondent prayed that the court orders the 1st Appellant to pay a fine of Kshs. 250,000/= being a sum equivalent to the value of the cane that was on transit at the time the motor vehicle was illegally seized by the 1st Appellant. The Respondent further prayed for an order of immediate release of the suit motor vehicle.
7. On 28th April 2023, the 2nd Appellant filed a notice of preliminary objection challenging the jurisdiction of the court and contending that the Respondent's application was defective. Alongside this, the 2nd Appellant also filed an application seeking to have the ex parte orders granted in favour of the Respondent on 25th April 2025 set aside on the ground that it had been condemned unheard and that the Respondent had failed to disclose to the court the fact that it had earlier filed a similar matter being Webuye Misc. Application No. E20 of 2023 between the same parties and which it withdrew when it failed to secure the release of the motor vehicle only to file the present one. The 2nd Respondent also averred that it had not been served with the pleadings.
8. On 28th April 2023, Counsel for the parties appeared before the trial Magistrate when the Respondent sought to argue its application for contempt. The Appellant's Counsel sought time to respond and argued that the 2nd Appellant was not served with the proceedings.
9. The court, while noting that it was unfortunate that a farmer had not taken his produce to the Respondent, ordered that the suit motor vehicle be released immediately pursuant to the court's earlier



orders. The court also issued directions that the parties file their responses to the application filed by the Appellants by 2nd May 2023. The court indicated that final directions in the matter would be taken on 3rd May 2023.

10. On 3rd May 2023, the trial Magistrate delivered a ruling in which it made a determination on the contempt proceedings and held that the Respondents were duly served but ignored orders of the court in all the three instances. The court then directed the Respondent to deposit the contested fees in court upon which the Appellant would release the suit motor vehicle. The court further set the Appellant's application and preliminary objection as well as the sentence hearing for contempt of court for 31st May 2023.
11. Being dissatisfied with the said ruling, the Appellants promptly lodged an appeal which it later amended and set down its grounds of appeal as follows:-
 1. The learned trial Magistrate erred in law and in fact by failing to address the issue of jurisdiction at the earliest, which issue had been raised by the Appellant by a Preliminary Objection dated 27th April 2023.
 2. The learned trial Magistrate erred in law and in fact in making findings contrary to the provisions of the East African Community Vehicle Load Control Act, 2016, being the applicable law in the suit with regard to procedures in case of vehicle overloading.
 3. The learned trial Magistrate erred in law by failing to interpret the provisions of the East African Community Vehicle Load Control, 2016 Act, in a manner that gives effect to the intentions of the East African Community Partner States in controlling overload within the regional trunk network.
 4. The learned trial Magistrate erred in law by failing to interpret the provisions of the East African Community Vehicle Load Control Act, 2016 giving rise to absurd results in the course of the implementation of the East African Community Vehicle Load Control Act, 2016.
 5. The learned trial Magistrate erred in law and in fact by ordering the motor vehicle to be released by the Appellants without payment of the overload fees and storage charges being levied to the Court contrary to the express provisions of the East African Community Vehicle Load Control Act, 2016 that requires the same to be paid to the 2nd Appellant.
 6. The learned trial Magistrate erred in law and in fact by entertaining the Respondent's conduct in abuse of the court process when it concurrently pursued similar orders over the same subject matter between the same parties for similar orders they found fit.
 7. The learned trial Magistrate erred in law and in fact by failing to address the issue of jurisdiction raised by the Appellant by a preliminary objection dated 27th April 2023.
 8. The learned trial Magistrate erred in law and in fact in granting the ex-parte Order dated 25th April 2023 and subsequently, failed to address and determine the Appellants' application dated 27th April 2023, which sought to set aside ex-parte Orders granted on 25th April 2023.
12. Based on the aforesaid eight grounds of appeal, the Appellants urged the court to set aside the ruling and orders of the trial Magistrate to allow its preliminary objection dated 27th April 2023 and to grant them the costs of the appeal.
13. The court gave directions that the appeal be canvassed through written submissions and both parties filed detailed submissions.



Appellants' Submissions

14. The Appellants contend that there was no proper suit before the court and therefore the filing of the Miscellaneous application without filing a plaint was in contravention of the law. The Appellants rely on the case of Joseph Kibowen Chemior v. William C. Kiseru [2013] eKLR.
15. The Appellants further submit that the court was not justified to issue ex parte orders and rely on the case of Abraham Lenauia Lenkeu v. Charles Katekeyo Nkairu [2016] eKLR. It is the Appellants' case that by dint of Article 47 and 50 (1) of *the Constitution*, the court ought to have allowed a limited time for them to respond to the application before granting any order.
16. Further, the Appellants submit that there was no suit pending before the court since the Respondent filed a Miscellaneous application and by granting the injunction ex parte, the trial Magistrate had already determined the application and the inter parties hearing would have been a mere academic exercise.
17. The Appellants further submit that there was no competent suit before court and relies on the case of Kalyonge v. Karanja [2022] KEHC 16174 (KLR).
18. Additionally, the Appellants submit that the court erred in delivering a Ruling on 3rd May 2025 in contravention of the directions issued on 25th April 2023. They submit that the court ought to have determined their application to set aside the ex parte orders first before any delivery of the Ruling on contempt. The Appellants contend that the court should have given them a chance to be heard in view of the fact that they filed their application seeking to set aside the ex parte orders at the earliest opportunity.
19. The Appellants also submit that the court should have heard their preliminary objection in the first instance as it touched on the jurisdiction of the trial court to hear and determine the Respondent's application.
20. Finally, the Appellants submit that in granting the ex parte order, the court acted contrary to the provisions of the East African Community Vehicle Control Act 2016 which defines an overloaded vehicle as a vehicle that is detected to have exceeded the prescribed legal limits for the axle weight or gross vehicle weight and which prohibits the use of an overloaded vehicle on the Regional Trunk Network by dint of Section 6 (1) of the Act.
21. The Appellants contend that by failing to address the matter on merit, the court erred in ordering the release of the motor vehicle without payment of the overload fee and storage charges. The Appellants urged the court to allow the appeal and directs the Respondent to pay the overload fee as prescribed by law.

Respondent's Submissions

22. The Respondent submits that at the time the suit vehicle was intercepted, it had an Exemption Permit to cover the period of 5th December 2020 to 5th June 2023 which document was presented to the Appellants' agents at the time of weighing. The Respondent argues that the Exemption Permit notwithstanding, the Appellants' agents weighed the suit vehicle and imposed an overload fine which the Respondent disputed and demanded a reweigh which demand was declined.
23. The Respondent contends that the trial Magistrate was right in issuing the orders of injunction which orders were disobeyed by the Appellants.



24. It is the Respondent's submissions that the orders sought by the Appellants have been overtaken by events as the suit vehicle was released way back on 6th May 2023 pursuant to various orders by the trial Magistrate. The Respondent posits that the appeal is therefore a purely academic exercise. The Respondent argues that it made a deposit with the trial court following the overloading claims and the court should not act in vain by making futile orders which cannot be complied with. It also argues that the court must prevent a multiplicity of orders and invites this court to make a finding that this appeal was already as a matter of fact and law, rendered nugatory.
25. The Respondent also submits that the trial Magistrate was justified to issue the orders dated 25th April 2023 as he had inherent orders under Section 3A of the Civil Procedure Act. It also relies on the case of *Wachira Karani v. Bildad Wachira* [2016] eKLR where the court stated:-

“The fundamental duty of the court is to do justice between the parties. It is, in turn, fundamental to that duty that parties should each be allowed a proper opportunity to put their cases upon the merits of the matter. It is fundamental principle of natural justice, applicable to all courts whether superior or inferior, that a person against whom a claim or charge is made must be given a reasonable opportunity of appearing and presenting his case. If this principle be not observed, the person affected is entitled, *ex debito justitiae*, to have any determination which affects him set aside.

Discussing the nature and objects of the inherent powers of the court, Sir Dinshah Mulla in *The Code of Civil Procedure* observes that:-

"the Code of Civil procedure is not exhaustive, the simple reason being that the legislature is incapable of contemplating all the possible circumstances, which may arise, in future litigation, and consequently, for providing the procedure for them. The principle is well established that when the Code of Civil Procedure is silent regarding a procedural aspect, the inherent power of the court can come to its aid to act *ex debito justitiae* for doing real and substantial justice between the parties. The court has, therefore, in many cases, where the circumstances so require, acted upon the assumption of the possession of an inherent power to act *ex debito justitiae*, and to do real and substantial justice for the administration, for which alone, it exists. However, the power, under this section, relates to matters of procedure. If ordinary rules of procedure result in injustice, and there is no other remedy, they can be broken in order to achieve the ends of justice..."

The court is not powerless to grant relief when the ends of justice and equity so demand, because the powers vested in the court are of a wide scope and ambit.”

26. The Respondent argues that Section 1A and 1B of the Civil Procedure Rules enjoins the court to ensure that there is just determination of the dispute and the court should always opt for the lower rather than the higher risk of justice. In this case, there was a load of sugar cane which is a perishable commodity that would have led to a bigger loss not only to the Respondent but also to the farmers, if detention continued.
27. According to the Respondent, Section 17 of the East African Community Vehicle Control Act (the Act) allowed for depositing of security in order to secure the release of the vehicle. It submits that in this case, the release of the suit vehicle was done upon a compelled reweighing of the same and subject to the deposit of the prescribed fine into court which orders the Magistrate issued to ensure that neither the Appellants nor the Respondent, her investors and farmers suffered any loss.



28. The Respondents further argue that the reweighing established that the sugarcane loaded was within the mandatory limit before starting to wither away due to prolonged detention and the only issue is whether the Respondent was liable to pay the fine to the 2nd Appellant.
29. The Respondent submits that there is nothing in the Act which gives monopoly to the Appellants in decision making in regard to overloaded vehicles and it was therefore not barred from approaching the court for redress.
30. In regard to the claim that the Appellants were denied audience by the trial Magistrate, the Respondent argues that the claim is premature as there were existing orders by the trial Magistrate directing that both the Appellants' preliminary objection and the Respondent's application dated 24th April 2023 be canvassed by way of written submissions with a Ruling date being scheduled for the 31st May 2023.
31. The Respondent asserts that the learned trial Magistrate had and rightfully exercised his jurisdiction over the matter before him.
32. As to the question whether the Respondent's application dated 24th April 2023 was rightfully before court, the Respondent urges the court to find that the overriding objective overshadows all technicalities, precedents, rules and actions which are in conflict and whatever is in conflict must give way. The Respondent relies on the Court of Appeal case of Stephen Boso Gititha v. Family Finance Building Society and 3 others Civil App. 263 of 2009 (UR 183/09), Article 159 (2) (d) of *the Constitution* and the case of Joseph Kibowen Chemjor v. William C. Kiseru [2013] KE ELC 140 (KLR).
33. The Respondent submits that the Appellants did not demonstrate any prejudice that they will likely suffer if the trial Magistrate is allowed to render his scheduled ruling on both the Respondent's application and the Appellants' preliminary objection.
34. The Respondent further submits that it is upon the trial court's determination of the pending application that it can decide whether to file suit against the Appellants and for the reasons submitted, the appeal is an abuse of the court's precious judicial time and should be dismissed with costs to the Respondent.

Analysis and Determination

35. This being the first appellate court, my duty is to subject the evidence before the lower court to fresh scrutiny and re-evaluation with a view to making my own independent finding as established in *Selle & Another v. Associated Motor Boat Co. Ltd 7 Another* [1968] EA 123.
36. Having perused the Memorandum of Appeal and the parties' submissions, I find that the following issues arise for determination:-
 - a. Whether the trial court erred in failing to address the issue of jurisdiction raised by the Appellants in the preliminary objection dated 27th April 2023.
 - b. Whether the trial court had the jurisdiction to hear and determine the Respondent's application.
 - c. Whether the trial court erred in issuing the ex-parte orders of injunction directing release of the suit motor vehicle.
 - d. Whether the trial court erred in entertaining the Respondent's conduct in abuse of the process of the court.



- e. Whether the Appellants were condemned unheard.
37. It is a fundamental principle of law that Jurisdiction is everything and where a preliminary objection on jurisdiction is raised by a party, it should be dealt with at the beginning of the hearing. In *Registered Trustees of the Catholic Archdiocese of Nyeri and Another v. Standard Limited and Others* [2003] 1 EA Page 53, the court held that:-
- “Preliminary point is to be raised at the beginning of the hearing and not at the end of the hearing.”
38. In view of the fact that the preliminary objection raised matters of law that touched on the jurisdiction of the court to hear and determine the application, the trial Magistrate was obligated to hear and dispose of it in the first instance for if it were to be upheld by court, it would have been a waste of judicial time to proceed with the suit as filed. In this, I am guided by the case of *Mukisa Biscuits Manufacturing Co. Ltd v. West End Distributors Ltd* [1969] EA 696 where the court held as follows:-
- “...A Preliminary Objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the Jurisdiction of the court or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.”
39. The second issue is whether the trial court was seized with the requisite jurisdiction to hear and dispose of the application.
40. It is trite law that an application for an injunction can only be issued where there is substantive suit and where the applicant demonstrates the existence of special circumstances to warrant the order. In the case of *Cresta Investments Limited v. Gulf African Bank Limited & Another* [2020] eKLR the court held that:-
- “...Moreover, an application for injunction under Order 40 of the Civil Procedure Rules is predicated on a suit filed by the party seeking the injunction. An injunction without a substantive claim is a plea in vain and cannot lie in law or at all.”
41. Before seeking injunctive relief, an applicant is therefore under a legal obligation to file a proper suit as provided by Section 19 of the [Civil Procedure Act](#) as read together with Order 3 Rule 1 of the Civil Procedure Rules. The law envisages that in granting an injunction, the court should only do so if the injunction is ancillary or coincidental to the relief sought.
42. Order 40 Rule 1 which the Respondent relied on provides:-
- “Where in any suit it is proved by affidavit or otherwise—
- (a) that any property in dispute in a suit is in danger of being wasted, damaged, or alienated by any party to the suit, or wrongfully sold in execution of a decree; or
 - (b) that the defendant threatens or intends to remove or dispose of his property in circumstances affording reasonable probability that the plaintiff will or may be obstructed or delayed in the execution of any decree that may be passed against the defendant in the suit, the court may by order grant a temporary injunction to restrain such act, or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal, or disposition of



the property as the court thinks fit until the disposal of the suit or until further orders.”

43. In filing the Notice of Motion application for an injunction, the Respondent acted in vacuo and in absence of a substantive suit, the orders sought were not tenable.

44. The Respondent sought to invoke the inherent jurisdiction of the court, the overriding objectives and Article 159 (2) of *the Constitution* in a bid to buttress its submissions that the trial Magistrate acted rightfully in granting the injunction in absence of a primary suit. However, I find that the defect in procedure was not one that can be cured by Article 159 (2) as it went to the jurisdiction of the courts. The court’s jurisdiction in any matter is derived from the pleadings and therefore the manner in which one approaches the court is a fundamental question. In the case of *Elasco Rono & 8 others v. Kenya Forest Service & 4 others* [2024] KEELC 5247 (KLR), the court in addressing a similar issue held that:-

“26. ...it suffices to underscore that the procedure for approaching the jurisdiction of the court is not only a procedural issue, which can be cured vide invocation of the provisions of Article 159 (2) (d) of *the Constitution*. To the contrary the procedure for approaching the jurisdiction of the court is a fundamental and jurisdictional question, which goes to the root of the matter and thus where the jurisdiction of the court is improperly invoked, the impugned matter is rendered annulity.

27. To buttress the foregoing observation, I adopt and reiterate the succinct exposition of the law by the Court of Appeal in the case of *Scope Telematics International Sales Limited v Stoic Company Limited & another* [2017] eKLR, where the court stated and held as hereunder:

“The procedure applicable in such circumstances is clearly spelt out by Rule 2 of the Arbitration Rules, 1997. Suffice it to say, that the rule is couched in mandatory terms. Our jurisprudence reflects the position that where there is a clear procedure for the redress of any particular grievance prescribed by *the Constitution* or Statute, that procedure should be strictly followed (See *Speaker of National Assembly vs. Njenga Karume* [2008] 1 KLR 425). The 1st respondent did not proffer any reason or excuse for its failure to premise its application upon a suit as was required by the rules. It however sought to rely on Article 159 of *the Constitution* for the proposition that justice is to be administered without undue regard to technicalities. That Article also provides that alternative forms of dispute resolution mechanisms like arbitration should be promoted by the courts. There are however many decided cases to the effect that Article 159 of *the Constitution* should not be seen as a panacea to cure all manner of indiscretions relating to procedure...”



45. The other issue that touches on jurisdiction is whether the court erred in law in ordering the release of the suit vehicle without payment of the overload fees contrary to the Act. Section 17 of the Act provides that:-

- “(1) When an authorized officer determines that a vehicle is carrying a load in excess of the legal load limit under this Act, he or she shall issue a weighing report setting out the overload particulars and the amount of overload fees payable.
- (2) Where an authorized officer, while a journey is being undertaken, determines that a vehicle is carrying a load in excess of the legal load limit, the authorized officer shall in consultation with relevant implementing agencies, not allow the vehicle in question to continue its journey, unless the load is redistributed and the vehicle is, upon being reweighed, found to be within the legal load limit, or the vehicle is offloaded to lower its weight to the legal load limit and—
- (a) any amounts due under subsection (1) have been paid to the national roads authority or its duly appointed agent; or
- (b) a guarantee in the prescribed format is provided by the transporter that such amounts shall be paid.
- (3) Where the fact of overloading is not disputed by the transporter, the transporter shall sign and acknowledge the weighing report in the prescribed manner and the transporter shall be liable for the overload fees which may be recovered as a summary debt by the national roads authority.
- (4) Where the fact of overloading is disputed by the transporter, the authorized officer weighing the vehicle shall indicate such dispute in the weighing report, and a copy of the disputed report shall be issued to the transporter who may—
- a. pay the requisite overloading fees on a without prejudice basis to secure the release of the vehicle, make such necessary adjustment on the load as may be directed by the authorized officer and lodge an appeal against the fees as provided for by regulations made under this Act; or
- b. appeal against the fees, using regulations made under this Act, during which period the vehicle will remain detained at such designated place at the cost of the transporter.”

46. My understanding of Section 17 of the Act is that the Respondent should have first adhered to the prescribed procedure under the Act by paying the overload fees on a without prejudice basis to secure the release of the vehicle, then appeal against the fees in accordance with the regulations made under the Act.

47. From the Respondent’s documents, the Respondent did not note its dispute in the weighing report as provided by the Act nor pay the overloading fees to secure the release of the vehicle but chose to rush to court for relief and when the Webuye Court failed to grant the orders prayed for, filed another application before Butali Court where the trial Magistrate granted the orders. In Office of the Director



of Public Prosecutions (ODPP) v. Juma Chemomenyu Batuli [2020] eKLR, the court determined that:-

- a. The East Africa Community Vehicle Load Control Act (EACVeLCA) is an East African Community statute that was duly ratified and made an integral part of Kenyan law pursuant to Article 2 (6) of *the Constitution*;
- b. The EACVeLCA takes precedence over other Kenyan laws or statutes in respect of matters to which its provisions relate;
- c. The EACVeLCA allows for the administration and enforcement of its provisions through national roads authorities or other institution designated by Partner States and officers authorized thereunder;
- d. The First Second and Third Schedules to the EACVeLCA establish the Regional Trunk Road Networks; set out the permissible maximum axle load limits; and the gross vehicle weight limits;
- e. All weighbridges in operation along the Regional Trunk Road Network at the time of coming into force of the East African Community Vehicle Load Control (Enforcement Measures) Regulations, 2018 were deemed automatically to be approved weighbridges under the Regulations;
- f. Breaches of the EACVeLCA by way of overloading, identified and assessed at an approved weighbridge on a Regional Trunk Road Network, are remediable by way of a fee surcharge determined under the provisions of the Act; and court action may only be resorted to where expert determination of an assessment has been disputed;
- g. It is permissible under the EACVeLCA for a vehicle to be detained pending payment of an overloading fee.”

48. In the case of Martin Nyongesa Barasa v. Traffic Commandant & 2 others [2021] eKLR the court stated:-

“Taking into consideration the petition herein and the 2nd respondent’s response thereto, it is exquisitely clear that there are elaborate mechanisms which should be followed once one is found to have contravened the provisions of this Act. It is the duty of the petitioner to ensure that he has followed and exhausted the remedies therein before approaching the court for appropriate orders.”

49. As an ancillary, in the case of R. v. Director General, KenHA & 2 others Exparte Daniel Ochieng Ofula, the court held that:-

“There are dispute resolution mechanisms provided by the Act which must be exhausted by the applicant before approaching the court for redress. It is thus my finding that the application is premature.”

50. Ultimately, I find that the Respondent acted prematurely in that it filed the application that resulted in the impugned series of orders before the court before exhausting the dispute resolution mechanisms set out by the Act.



51. In regard to the fourth issue, it is instructive to note that the Respondent secured an ex parte mandatory injunction that was not founded on any suit. The injunction directs the Appellants to unconditionally release the suit motor vehicle to the Respondent. Upon release, the application was spent as there was no other prayer for the court to hear and determine. The application was therefore an abuse of the process of the court.
52. From the record, the order of injunction was issued on 25th April 2023. The Affidavit of Service filed by the Respondent shows that the order was forwarded to the 2nd Appellant vide the email address dg@kenha.co.ke and copied to integrity@kenha.co.ke. The print out shows that the email was forwarded at 12.00 p.m. The same process server who served the order upon the 2nd Appellant swore that he left for Webuye at 12.40 p.m. where he served the 1st Respondent. The only conclusion I can arrive at is that the order was served in the afternoon well after 1 p.m. On 27th April 2023, the Respondent was back in court with contempt proceedings which the trial court certified as urgent and scheduled for hearing on 28th April 2023 at 9.30 a.m. On 28th April 2023, the Appellants filed a Notice of Motion, under Certificate of Urgency urging the trial court to set aside the ex parte orders dated 25th April 2023 and the application be heard and determined on merit. Contemporaneously, the Appellants filed the notice of preliminary objection which inter alia, challenged the jurisdiction of the court.
53. Having reviewed the proceedings it is apparent that on 28th April 2023, Mr. Maruti sought time to respond to the contempt proceedings. The record states:-
- “Mr. Maruti – in terms of the issues raised in respect to the contempt of court, we pray for time to file a substantive reply. We were served only yesterday.” The court did not grant the Appellants leave to respond to the contempt proceedings but proceeded to hear the Respondent on the contempt proceedings and gave directions as follows:-
- “(1) The motor vehicle be released immediately by the Respondents pursuant to the court order issued on 25th instant pending the Ruling on the court on 3rd May 2023.
- (ii) Parties given time to file Responses to the Application and preliminary objection by 2nd of May 2023.
- (iii) Final directions on the matter shall be taken on 3rd May 2023.”
54. It is a principle of natural justice that one should not be condemned unheard. By proceeding to hear the contempt application and render a ruling on the contempt proceedings in disregard of the Appellants’ application for time to respond, the trial court condemned the Appellants unheard. The right to be heard is sacrosanct and is embedded in Article 50 (1) of *the Constitution* which states that:-
- “Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.”
- This right is reinforced in Article 25 (c) of *the Constitution* thereby making it a non-derogable right.



55. In the case of Akber Abdullah Kassam Esmail v. Equip Agencies Ltd & 4 others [2014] eKLR, the Court of Appeal held that:-

“...The authorities show that for the purposes of showing cause why he should not be committed, a contemnor is entitled to be heard. It is noteworthy that even in Hadkinson Vs Hadkinson, (supra), Lord Denning was clear enough that it is unusual for a court to refuse to hear a party to a suit and that such cause should be taken only when justified by grave considerations of public policy. The fact that a party to a suit has disobeyed an order of the court is not itself a bar to his being heard; a court could exercise its discretion to refuse to hear him if the disobedience continued to impede the cause of justice.”

56. It may be argued that the situation was dire because it involved sugar cane which was a perishable product. But weighing the circumstances against the liberty of the Appellants, the trial court ought to have heard their part of their story before holding them guilty of contempt.

57. I am alive to the fact that parties are under an obligation to obey a court order. Over and over again, the courts have emphasized the need to ensure that court orders are obeyed. However, without giving an opportunity to a purported contemnor to be heard, one cannot be certain whether they are in actual contempt. In the case of Cecil Miller v. Jackson Njeru & Another [2017] eKLR, the court set down the threshold for one to be found in court of a court order as follows:-

- “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 conduct was deliberate.”

58. It is my view that a proper finding of contempt could only be arrived at after hearing the Appellants and since contempt proceedings are quasi-criminal and require a higher standard of proof than ordinary, the court should not have ignored the Appellants’ plea for time to respond.

59. In the case of Alfred Mutua v. Boniface Mwangi [2022] KEHC 2230 (KLR) cited with approval by the Supreme Court in Stephen Maina Githiga & 5 others v. Kiru Tea Factory Company Ltd Petition Number 13 of 2019, the court held as follows:-

“ 22. In my view, considering the seriousness with which the Court takes contempt of court proceedings, every stage of the hearing must be expressly clear to the Defendant and any ambiguity must be resolved in favour of the Defendant since such proceedings are quasi-criminal in nature, otherwise a benefit of doubt would inure to the benefit of the Defendant...”

60. The Supreme Court went further to consider whether a court hearing a contempt of court application can convict the alleged contemnors without affording them a hearing and held thus:-

“ 50. Due to the quasi-criminal nature of contempt proceedings and the gravity of the consequences that flow from these proceedings, courts are required to adhere to the principles of natural justice, procedural fairness, and the right to a fair hearing. This is because, in contempt proceedings, the liberty of the subject is usually at stake, therefore, if a party alleges breaches of his fundamental



rights and freedoms as envisaged under *the Constitution* albeit, at the Court of Appeal, this court cannot afford to shut its eye to such serious legal issues that call for settling as the apex court.”

58. In enforcing compliance with lawful court orders, the procedures adopted by the court must be fair and reasonable in which full opportunity is given to an alleged contemnor to defend himself or herself. This is because contempt proceedings being quasi-criminal, require a higher standard of proof than in normal civil cases, and one can only be committed to civil jail or penalized on the basis of evidence that leaves no doubt as to the contemnor’s culpability.”

61. Having said all that, I find that the appeal has merit and is hereby allowed. Consequently, the ruling and orders of the trial court dated 25th April 2023, 28th April 2023, 3rd May 2023 and 5th May 2023 are hereby set aside.

62. The Respondent is directed to pay the overload fees as prescribed by the Act.

63. The Appellants shall have the costs of the Appeal.

DATED, SIGNED AND DELIVERED AT KAKAMEGA THIS 4TH DAY OF APRIL 2025.

A. C. BETT

JUDGE

In the presence of:

No appearance for the Appellants

No appearance for the Respondent

Court Assistant: Polycap

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