Bliss GVS Health Care Limited v Consolata Hospital Mathari & 2 others (Civil Appeal E049 of 2021) [2024] KEHC 7647 (KLR) (20 June 2024) (Ruling)

Neutral citation: [2024] KEHC 7647 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NYERI

CIVIL APPEAL E049 OF 2021

DKN MAGARE, J

JUNE 20, 2024

BETWEEN

BLISS GVS HEALTH CARE LIMITED .... APPLICANT

AND

CONSOLATA HOSPITAL MATHARI .... 1ST RESPONDENT

AUTO GALLERY (MOMBASA) LIMITED .... 2ND RESPONDENT

CHADOR AUCTIONEERS .... 3RD RESPONDENT

RULING

1. This is an application dated 27/9/2023. The same seeks orders that:-
   a. Spent
   b. That the Respondents be denied audience before the Honourable court until such time as they have purged its contempt.
   c. That the Honourable court be pleased to issue the following orders against the Respondents and/or their Directors and/or officers for deliberately defying and disobeying the court Order issued by the Honourable Court on 15th May, 2023.
      i. The Respondents and/or their Directors and/or officers, be fined such sums of money as this Honourable Court may direct and that the same be paid into court forthwith.
      ii. Property belonging to the Respondents and/or their Directors and/or officers, be attached to the extent of such value as this Honourable Court may direct; and
      iii. The Respondents' Directors and/or officers, be committed to and/or detained in prison for a term of six (6) months.

d. That there be liberty to apply.

e. That the cost of this application be borne by the Respondents.

2. The order impugned was made in the presence of two parties that is, Consolata Hospital and Bliss GVS Health Care Ltd. The 2nd and 3rd Respondents are not parties to the order.

3. An order issued in rem is binding against all and sundry. The 2nd and 3rd Respondents were not party to the said order. An order issued against another, without hearing those other parties is made in vacuo.

4. The order is lawful and binding on the Respondent. If the Applicant wishes the same order to bind the 2nd and 3rd Respondents they must specifically sue them. The 2nd Respondent is not a party and cannot be sued. There is no order in the file against them. The pleadings are clear as they involve only 2 parties. The presence of the 3rd Respondent is understandable as he is an officer of this court. However, the name of the officer cited is absent.

5. There was no order against Auto Gallery (Mombasa) Ltd. The order related to the auctioneers charges and storage charges. It has transpired that storage charges are owed to a Third Party who is neither an officer of the court nor a party to the suit. The release order remains in situ. However it is incapable of execution since it is directed to a nonparty. Such an order is null and void as is against Auto Gallery (Mombasa) Ltd, the 2nd Respondent to the Application.

6. In *Macfoy v United Africa Co. Ltd* [1961] 3 All E.R. 1169, Lord Denning delivering the opinion of the Privy Council at page 1172 (1) said;

> "If an act is void, then it is in law a nullity. It is not only bad, but incurably bad. There is no need for an order of the Court to set it aside. It is automatically null and void without more ado, though it is sometimes convenient to have the Court declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse."

7. This is not to impugn the order of the court but to limit it to the 2 parties. Auctioneers may tax their charges. However, Auto Gallery must be paid before the vehicle is released to them.

8. The order of release basically removes the responsibility of payment from the 1st Respondent to the Applicant. Until the 2nd Respondent Auto Gallery (Mombasa) Ltd is paid the vehicle remains released but there is no disobedience of the court orders since they have not been paid.

9. The Notice of Preliminary Objection dated 17/10/2023 is merited.

10. Order, otherwise justice will be for the first past the post. There are no steps left for the order of release for the 1st and 3rd Respondents. They were served and indicated to the 2nd Respondent that the order needed to be complied with. However, the order did not cover the 2nd Respondent. He is not bound to comply with an order not directed to them. The 2nd Respondent is not bound by that order having been made in relation to the Respondent – Consolata Hospital Mathari.

11. This is in line with the principle of audi alterum partem, the court cannot punish a person for an order issued unheard. The orders issue, is what is known as an in personum order. However, due to intervening situation it could not be executed.

12. The Applicant filed submissions stating that any person committing contempt should be punished. They relied on the case of *Samuel N. M. Mweru & others v National Land Commission & 2 others* [2020] eKLR where it is stated:

> " 40. It is an established principle of law that in order to succeed in civil contempt proceedings, the applicant has to prove
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> a. the terms of the order,
>
> b. Knowledge of these terms by the Respondent,
>
> c. 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. Perhaps the most comprehensive of the elements of civil contempt was stated by the learned authors of the book Contempt in Modern New Zealand who succinctly stated:
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> > There are essentially four elements that must be proved to make the case for civil contempt. The applicant must prove to the required standard (in civil contempt cases which is higher than civil cases) that:-
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> > a. The terms of the order (or injunction or undertaking) were clear and unambiguous and were binding on the defendant;
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> > b. The defendant had knowledge of or proper notice of the terms of the order;
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> > c. The defendant has acted in breach of the terms of the order; and
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> > d. The defendant's conduct was deliberate.

13. The only issue the Applicant failed to deal with is clause (c) of his Lordship Mativo's Salutary comments in NLC Case. The failure must be by the Respondent. In this case there was only one Respondent, Consolata Hospital Mathari. I have not seen any order joining them to the proceedings or any order directed at them.

14. The decision of the court in *Shimmers Plaza Limited v National Bank of Kenya Limited* [2015] eKLR it was held that:

> " Would the knowledge of the judgment or order by the advocate of the alleged contemnor suffice for contempt proceedings" We hold the view that it does. This is more so in a case such as this one where the advocate was in court representing the alleged contemnor and the orders were made in his presence. There is an assumption which is not unfounded, and which in our view is irrefutable to the effect that when an advocate appears in court on

instructions of a party, then it behoves him/her to report back to the client all that transpired in court that has a bearing on the client's case.

15. This also applies to the preliminary objection. A preliminary law, has to be on non-disputed facts in its constitution. It cannot be based on disputed facts or argumentative postulations.

16. The Court is not involved with questions of fact. In hearing a preliminary objection, this court proceeds on an understanding that what is pleaded is true. It is what the English common law used to call a demurrer. The locus classicus case of *Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd* [1969] E.A. 696, made this pertinent observation. It said: -

> " The first matter relates to the increasing practice of raising points, which should be argued in the normal manner, quite improperly by way preliminary objection. The improper raising of points of preliminary objection does nothing but unnecessarily increases costs and, on occasion, confuses issues. This improper practice should stop".

17. In a Tanzanian case of *Hammers Incorporation Co. Ltd v The Board Of Trustees of the Cashewnut Industry Development Trust Fund*, the Court of Appeal, (Rutakangwa, N. P. Kimaro and S. S. Kadage JJA), sitting in Dar Es Salaam in their decision given on 17/9/2015 regretted that the practice of raising preliminary objection that was frowned upon by the Court of Appeal in Kampala in the Mukisa Biscuit case(Supra) still persists. They stated as doth: -

> " It was hoping against hope. We believe that had that Court survived to this day it would have issued a sterner warning. This is because the "improper practice" never stopped. Neither did it ebb away. On the contrary, it is on the increase. This forced the Full Bench of this Court in *Karata Ernest & others v The Attorney General*, Civil Revision No 10 of 2010 (unreported) to mildly urge all parties in judicial proceedings to pay heed to what was aptly pronounced in the mukisa biscuit case (supra). The late call appears to be falling on deaf ears as this ruling will demonstrate."

18. In the case of *Martha Akinyi Migwambo v Susan Ongoro Ogenda* [2022] eKLR, Justice Kiarie Waweru Kiarie, summarized the preliminary objection nicely as seen from two of the judges in *Mukisa Biscuit Manufacturing Co. Ltd* (supra): -

> " A preliminary objection must be on a point of law. The Court of Appeal in the case of *Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd* [1969) EA 696 at page 700 paragraphs D-F Law JA as he then was had this to say:
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> > ....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.
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> > At page 701 paragraph B-C Sir Charles Newbold, P. added the following:
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> > > A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is usually on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion...."

19. A Tanzania Court of Appeal sitting in Dar es Salaam, in *Karata Ernest & others v Attorney General* (Civil Revision No 10 of 2020) [2010] TZCA 30 (29 December 2010),(Luanda, J.A., Ramadhani, C.J. , Rutakangwa, JJA), put the issue of preliminary objections in a more succinct manner: -

> "At the outset we showed that it is trite law that a point of preliminary objection cannot be raised if any fact has to be ascertained in the course of deciding it. It only "consists o f a point of law which has been pleaded, or which arises by dear implication out of the pleading obvious examples include: objection to the jurisdiction of the court; a plea of limitation; when the court has been wrongly moved either by non-citation or wrong citation of the enabling provisions of the law; where an appeal is lodged when there is no right of appeal; where an appeal is instituted without a valid notice of appeal or without leave or a certificate where one is statutorily required; where the appeal is supported by a patently incurably defective copy of the decree appealed from; etc. All these are clear pure points of law. All the same, where a taken point of objection is premised on issues of mixed facts and law that point does not deserve consideration at all as a preliminary point of objection. It ought to be argued in the "normal manner" when deliberating on the merits or otherwise of the concerned legal proceedings.

20. Justice Prof J.B. Ojwang J (as he then was) succinctly addressed the issue of preliminary objection in the case of *Oraro v Mbaja* [2005] eKLR:

> "I think the principle is abundantly clear. A preliminary objection as correctly understood is now well settled. It is identified as, and declared to be the point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through the processes of evidence. Any assertion which claims to be a preliminary objection, and yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication, is not, as a matter of legal principle, a true preliminary objection which the court should allow to proceed. I am in agreement that where a court needs to investigate facts, a matter cannot be raised as a preliminary point.

21. It is therefore my view that a preliminary objection must be based on current law, and be factual in its constitution. It cannot be based on disputed facts or fats requiring further enquiry. In determining a preliminary objection therefore only 3 documents are required in addition to the *Constitution*. The impugned law, the pleadings by the respondent to the preliminary objection and the notice to raised a preliminary objection. If you have to refer to the Pleadings by the party issuing notice, then the preliminary objection is untenable.

22. The preliminary objection herein is based on the question whether a person can be held liable for orders in personum issued in a case they are not parties. In *Obala v Okello & 2 others* (Civil Appeal E022 of 2022) [2022] KEHC 15762 (KLR) (22 November 2022) (Judgment), R E Aburili, J stated as follows: -

> I find that the appellant was under an obligation, if she felt that someone else was responsible for or contributed to her predicament in the case, to enjoin that someone else as a third party, following the procedure laid out in the law, so that she can claim from him any loss or award that she may suffer, should the case be determined in favour of the respondent. A court of law can only determine the case or issues between the parties who are before it and not those parties who should have been or are yet to appear or be made parties to proceedings before it.
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> 39. In the case of Kenya Commercial Bank v Suntra Investment Bank Ltd (2015) eKLR, it was held that:"In law, a third party is enjoined in a suit at the instance

of the defendant and through the set procedure under order 1 rule 15-22 of the Civil Procedure Rules. And, liability between the defendant and the third party, but of course, after the court is satisfied that there is a proper question to be tried as to liability of the third party and the defendant and has given directions under order 1 rule 22 of the Civil Procedure Rules. The way I understand the law on third parties, such issues of third parties are issues and triable only between the third party and the defendant and cannot be a bona fide issue triable between the defendant and the plaintiff. On the basis of those legal reasons, even if the third party had been joined, which he has not, it is not a triable issue at all for purposes of liability between the plaintiff and the defendant. Looking at the defence and the generalized denials, it is a mere sham. It is a perfect candidate for striking out."

23. In the case of *David Njoroge Kinuthia & 653 others v Gnanjivan Screws and Fasterners Limited & 5 others* [2021] eKLR, A Mbogholi Msagha, as he then was stated as doth: -

"I consider the first issue to address is whether or not the 1st, 2nd and 3rd respondents were ever parties in the main suit at first instance. It is clear that the 1st, 2nd and 3rd respondents were not parties to the original suit and I believe that is why prayers 5 and 6 of the Notice of Motion seek leave of the court to join the 1st, 2nd and 3rd respondents to the proceedings. The inclusion of those prayers is a clear indicator in that regard.

In the case *Kiai Mbaki & 2 others v Gichuhi Macharia & another* [2005] eKLR the court stated as follows,

"The right to be heard is a valued right. It would offend all notions of justice if the rights of a party were to be prejudiced or affected without the party being afforded an opportunity to be heard."

It follows that the court cannot issue orders against a person that is not a party to the suit. Further to the foregoing, the main purpose why a party may be joined to a suit is to claim some relief from such a party. The fact that the 2nd and 3rd respondents purchased the assets of the judgment debtors does not make them shareholders or parties to the suit, neither attract any liability.

Under the *Civil Procedure Rules* such applications are brought under Order 1 rule 10 (2) of the Rules. This has not been cited by the applicants herein. Whatever the case, such an order may only be sought during the pendency of the suit. – see *Lillian Wairimu Ngatho and another v Moki Savings Co-operative Society Limited & another* (2014) eKLR. As at this stage there no suit pending between the plaintiffs and the defendants, judgment having been delivered on 30th January, 2004 and a decree extracted. The filing of objection proceedings did not make the respondents parties to the suit. If that were the case, prayers 5 and 6 of the application would not have proved necessary.

Where a party is not cited in the decree that is sought to be executed, the applying party must satisfy the court how liability may attach in such circumstances. A decree addresses the judgment debtor, and liability thereof must be clearly stated."

24. Finally, the Court of Appeal in *Kenya National Examination Council v Republic Ex-Parte Geoffrey Gathenji Njoroge & 9 others* (*supra*) the court stated as doth: -

> " The next issue we must deal with is this: What is the scope and efficacy of an Order Of Mandamus? Once again we turn to *Halsbury's Law of England*, 4th Edition Volume 1 at page 111 From Paragraph 89. That learned treatise says:-
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> > "The order of mandamus is of a most extensive remedial nature, and is, in form, a command issuing from the High Court of Justice, directed to any person, corporation or inferior tribunal, requiring him or them to do some particular thing therein specified which appertains to his or their office and is in the nature of a public duty. Its purpose is to remedy the defects of justice and accordingly it will issue, to the end that justice may be done, in all cases where there is a specific legal right and no specific legal remedy for enforcing that right; and it may issue in cases where, although there is an alternative legal remedy, yet that mode of redress is less convenient, beneficial and effectual."
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> ??At paragraph 90 headed "the mandate" it is stated:
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> > "The order must command no more than the party against whom the application is made is legally bound to perform. Where a general duty is imposed, a mandamus cannot require it to be done at once. Where a statute, which imposes duty leaves discretion as to the mode of performing the duty in the hands of the party on whom the obligation is laid, a mandamus cannot command the duty in question to be carried out in a specific way."
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> What do these principles mean? They mean that an order of mandamus will compel the performance of a public duty which is imposed on a person or body of persons by a statute and where that person or body of persons has failed to perform the duty to the detriment of a party who has a legal right to expect the duty to be performed…"

25. This means that an order binds only parties. A party cannot be brought in for purposes of punishment for an order it has not been commanded to act on. The court finds that the order was not against the 2nd respondent. There are no factual matrices the court can enter into to grant the court jurisdiction to punish a nonparty for an order not directed at them.

26. In the case of *Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others* [2012] eKLR, the supreme court stated as doth: -

> " This Court dealt with the question of jurisdiction extensively in, In the Matter of the Interim Independent Electoral Commission (Applicant), Constitutional Application Number 2 of 2011. Where the *Constitution* exhaustively provides for the jurisdiction of a Court of law, the Court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation. Nor can Parliament confer jurisdiction upon a Court of law beyond the scope defined by the *Constitution*. Where the *Constitution* confers power upon Parliament to set the jurisdiction of a Court of law or tribunal, the legislature would be within its authority to prescribe the jurisdiction of such a court or tribunal by statute law."

27. I find that the Order was not binding on the second respondent as they were nonparties. They were not joined to the Appeal for purpose of arguing the application giving rise to the order. No order was issued against them and none could issue.

28. As regards to the other respondents they were not in contempt as the goods were with the 2nd respondent and they had been informed to released but had not been paid.

29. Consequently, I dismiss the application dated 27/9/2023 and allow the preliminary objection dated 17/10/2023.

Determination

30. The upshot of the foregoing is that I make the following orders:-

   a. The order given on 15/5/2023 was in personum and not in rem. Consequently, the 2nd Respondent has not disobeyed the same, having not refused to release but subject only to payment of their money.

   b. The 2nd Respondent must be paid before the vehicle is released.

   c. Given that judgment has been read in the matter, the order that the auctioneers charges must be in abeyance is now spent, and the auctioneers' charges must be paid or undertaken before release.

   d. For avoidance of doubt, the application dated 27/9/2023 stands dismissed with no order as to costs.

DELIVERED, DATED AND SIGNED AT NYERI ON THIS 20TH DAY OF JUNE, 2024.

JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.

KIZITO MAGARE

JUDGE

In the presence of:-

Mr. Obam for the Applicant

Mr. Mugambi for the 1st Respondent

Mr. Ombiro for the 2nd Respondent

Court Assistant - Jedidah

M. D. KIZITO, J.