



**Said v Mussa & 2 others (Miscellaneous Application E053 of 2021)  
[2023] KEHC 635 (KLR) (10 February 2023) (Ruling)**

Neutral citation: [2023] KEHC 635 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MOMBASA  
MISCELLANEOUS APPLICATION E053 OF 2021  
OA SEWE, J  
FEBRUARY 10, 2023**

**BETWEEN**

**AHMEDSABIR TAHIR SHEIKH SAID ..... APPLICANT**

**AND**

**YUSUF MOHAMED HASSAN MUSSA ..... 1<sup>ST</sup> RESPONDENT**

**AL SIDDIQUE MOTORS LIMITED ..... 2<sup>ND</sup> RESPONDENT**

**SHAHBAZ MUHAMMED ..... 3<sup>RD</sup> RESPONDENT**

**RULING**

1. Before the Court is a Notice of Motion application dated March 22, 2021 filed by Waziri Omollo & Co Advocates on behalf of the applicant, Ahmetsabir Tahir Sheikh Said. The application is brought under Sections 1A, 1B and 3A of the [Civil Procedure Act](#) and Order 40 Rule 3(1) and 3(3) of the [Civil Procedure Rules, 2010](#) Laws of Kenya and all enabling provisions of the law. The application seeks orders that the 3<sup>rd</sup> respondent, Mr Shahbaz Muhammed, who is the Manager of the 2<sup>nd</sup> Respondent, be committed to a civil jail for a term of six months or for such period of time that this Honourable Court may deem fit for contempt of court; having deliberately disobeyed orders of Hon. Nabibya PM issued on of this court issued on August 17, 2020.

The applicant also prayed that this Court be pleased to grant further orders and/or directions as it deems fit and expedient in the circumstances, and that the costs of the application be borne by the respondents.

2. The application was premised on the grounds that injunctive orders were issued against the 1<sup>st</sup> and 2<sup>nd</sup> respondents in Mombasa CMCC No 806 of 2020, restraining them from interfering with the applicant's ownership of Motor Vehicle Registration No xxxx pending the hearing and determination of the application dated July 29, 2020; and that the 2<sup>nd</sup> respondent disregarded the orders and proceeded to obtain seizure and repossession orders vide Kisumu Misc Application No 65 of 2020 despite the



- fact that the cause of action arose in Mombasa and there are existing orders in place prohibiting such repossession. It was consequently the contention of the applicant that the 2<sup>nd</sup> respondent is in contempt of Court and ought to be punished accordingly.
3. The application was supported by the applicant's affidavit to which he annexed a copy of the order issued in Mombasa CMCC No 806 of 2020 on August 17, 2020 among other documents. He explained that, in utter disregard of the order, the auctioneers acting at the behest of the 2<sup>nd</sup> respondent went to his premises at Kizingo on March 20, 2021 and, with the assistance of the police officers from Central Police Station, Mombasa, forced him to drive his Motor Vehicle Registration No xxxx to Central Police Station.
  4. On behalf of the 2<sup>nd</sup> respondent Grounds of Opposition were filed on March 30, 2021 to the effect that:
    - (a) The application is filed contrary to Section 6 of the *Civil Procedure Act* as there is a pending suit in respect of the same subject matter between the same parties, being Mombasa CMCC No 806 of 2020: Ahmedsabir Tahir Sheikh Said v Yusuf Mohamed Hassan Mussa & Al Siddique Motors Limited.
    - (b) The Defendant has not in any way disregarded the orders of the Court;
    - (c) That the plaintiff has not proved personal service of the order upon the alleged contemnors;
    - (d) That the application is frivolous, vexatious and lacks merit and ought to be dismissed;
    - (e) The application is an abuse of the process of the Court and that it is in the interest of justice and fairness that it be dismissed with costs;
    - (f) The application is misconceived, fatally defective, bad in law and is for striking out.
  5. The foregoing grounds were expounded on by the Director of the 2<sup>nd</sup> respondent, Ali Bin Ijaz, in his affidavit sworn on April 9, 2021. At paragraphs 8 to 13, the 2<sup>nd</sup> respondent challenged the jurisdiction of this Court and contended that the application ought to have been filed in Mombasa CMCC No 806 of 2020.
  6. Directions were then given by the Court on March 30, 2021 that the application be disposed of by way of written submissions. It is notable however that, whereas counsel for the 2<sup>nd</sup> respondent complied and filed written submissions on March 4, 2022, there was no compliance on the part of the applicant. In his submissions, counsel for the 2<sup>nd</sup> respondent proposed the following issues for determination:
    - (a) Whether the Court has the requisite jurisdiction in respect of the application;
    - (b) Whether the 2<sup>nd</sup> respondent is in contempt of court; and,
    - (c) Whether the application is an abuse of the court process.
  7. In respect of the 1<sup>st</sup> issue, counsel made reference to *Owners of the Motor Vessel 'Lillian S' v Caltex Oil (Kenya) Ltd [1989] eKLR*, *Speaker of the National Assembly v James Njenga Karume [1992] eKLR* as well as Section 6 of the *Contempt of Court Act* in urging the Court to find that it lacks the jurisdiction to hear and determine the application. On whether the 2<sup>nd</sup> respondent is in contempt of court orders, counsel submitted that there was no proof of service of the order dated August 17, 2020 as no Affidavit of Service was availed proving such service. He argued that, in the absence of evidence of service, there would be no basis for the instant application. He relied on *Jacob Zedekiah Ochino & Another v George Aura Okombo & Others*.



8. On whether the 2<sup>nd</sup> respondent acted in breach of the terms of the order, counsel submitted that the applicant has only made allegations contending that the 2<sup>nd</sup> respondent instructed auctioneers to go and attach his motor vehicle but has not proved those allegations before the Court. He added that it was imperative for the applicant to enjoin the auctioneers, which he did not do; as that would have enabled the Court to substantively determine the issues in contest between the parties.
9. On whether the application is an abuse of the process of the Court, counsel reiterated the averment by the 2<sup>nd</sup> respondent that the lower court suit is pending hearing and determination; and therefore that the instant matter is sub-judice. He relied on *Muchanga Investments Limited v Safaris Unlimited (Africa) Ltd & 2 Others [2009] KLR 229* on the meaning of the phrase 'abuse of the court process'; which includes instituting multiplicity of actions on the same subject matter against the same opponent on the same issues. Thus, Mr Gakuo urged for the dismissal of the application dated March 22, 2021.
10. In the light of the foregoing, the principle issue that arises for determination is whether this court has the requisite jurisdiction to handle the application for contempt of court filed by the applicant. The brief facts are that the applicant filed a Complaint accompanied by a Notice of Motion application dated July 29, 2020 before the Chief Magistrates' Court in CMCC Suit No. 806 of 2020 against the Respondents. In his application before the lower court, the applicant sought for a temporary injunction, which prayer was granted by Hon M Nabibya, PM, on the August 3, 2020.
11. In the application before this court, the applicant alleges that the 2<sup>nd</sup> Respondent's Manager has disobeyed the orders issued on the August 3, 2020 by the subordinate court and has thus filed the application herein for Contempt of Court. The 2<sup>nd</sup> Respondent has filed its response and raised an objection that this court does not have requisite jurisdiction to handle the Contempt application herein filed by the applicant as the *Contempt of Court Act* empowers the Magistrates Court to punish for contempt.
12. Before the enactment of the [Contempt of Court Act, 2015](#), the the Magistrates courts had no powers to punish for contempt. Thus, under the [Judicature Act](#), Chapter 8, Laws of Kenya, that power was reposed in the Superior Courts by virtue of Section 5 of the [Judicature Act](#), Chapter 8 of the Laws of Kenya, which provided thus:
  - ' (1) 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 such power shall extend to upholding the authority and dignity of the subordinate courts.
  - (2) An order of the High Court made by way of punishment for contempt of court shall be appealable as if it were a conviction and sentence made in the exercise of the ordinary original criminal jurisdiction of the High Court.'
13. Then Parliament passed the *Contempt of Court Act*, No 46 of 2016. The Act stipulated thus in Section 6 thereof:
  - ' Every subordinate court shall have power to punish for contempt of court on the face of the court in any case where a person—
    - a. Assaults, threatens, intimidates, or willfully insults a judicial officer or a witness, during a sitting or attendance in a court, or in going to or returning from the court to whom any relevant proceedings relate;



- b. Willfully insterrupts or obstructs the proceedings of a subordinate court; or
  - c. Willfully disobeys an order or direction of a subordinate court.
14. In the same vein, Section 24 of the Act provided that:  
The High Court has the same jurisdiction, power and authority, in accordance with the same procedure and practice, in respect of contempt of subordinate courts as it has and exercises in respect of contempt of the High Court.
15. It has however come to pass that on November 9, 2018, the entire *Contempt of Court Act* was declared unconstitutional by Hon Mwita, J in [Kenya Human Rights Commission v Attorney General & another \[2018\] eKLR](#). The learned Judge held:
- ' Having considered the petition, the response, submissions, the [Constitution](#) and the law, I am persuaded that sections, 30 and 35 of the *Contempt of court Act* are unconstitutional. I, however, find that the entire Act fails the constitutional test of validity for lack of public participation and for encroaching on the independence of the judiciary. Consequently, and for the above reasons, this petition succeeds and I make the following orders.
- 1. A declaration is hereby issued that Sections 30, and 35 of the impugned *Contempt of Court Act* No 46 of 2010 are inconsistent with [Constitution](#) and are therefore null void.
  - 2. A declaration is hereby isstheued that the entire *Contempt Of Court Act* No 46 of 2016 is invalid for lack of public participation as required by Articles 10 and 118(b) of the [Constitution](#) and encroaches on the independence of the Judiciary.
  - 3. No order as to costs.
16. The foregoing notwithstanding, Section 10 of the Magistrate's Court Act No 26 of 2015, which came into force on January 2, 2016, provides: -
- (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 a court or willful breach of an undertaking given to a court constitutes contempt of court.
  - (4) ...
  - (7) A person may appeal against an order of the Court made by way of punishment for contempt of court as if it were a conviction and sentence made in the exercise of the ordinary original criminal jurisdiction of the Court.
17. From the above provision, it is clear that the magistrate's court now have the requisite jurisdiction to punish for contempt of court in civil cases, such as the one presented in the application herein, for the disobedience of their judgments, decree, directions, orders and other court processes. Thus, the



Court of Appeal in the case of Ramadhan Salim v Evans M Maabi T/A Murhy Auctioneers & another [2016] eKLR held: -

' The only jurisdiction the magistrate's court could exercise when dealing with contempt of court is, if it is committed in the face of the court. However, the Magistrates' Courts Act, 2015 which came into force on January 2, 2016 now gives the magistrate's courts unlimited jurisdiction to punish for contempt.'

18. It is thus only logical that the subordinate court that issued the order dated August 17, 2020 be the one to hear and determine the application for contempt under the Magistrate's Court Act No 26 of 2015. While it is true that the High Court and Court of Appeal have unlimited jurisdiction to handle applications for contempt of court by dint of Section 5 of the Judicature Act, I would agree with the 2<sup>nd</sup> Respondent's argument that if this Court makes a finding in the application as filed, it will curtail their right to Appeal. The Court of Appeal in Ramadhan Salim v Evans M Maabi T/A Murhy Auctioneers & another (Supra) acknowledged that it had concurrent jurisdiction to handle an application for contempt of court with the High Court but declined to determine the same so as not to pre-empt the parties right to appeal.

19. In the result, and for the foregoing reasons, the applicant's application dated March 22, 2021 is hereby struck out with no order as to costs.

It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 10<sup>TH</sup> DAY OF FEBRUARY 2023.**

**OLGA SEWE**

**JUDGE**

