



REPUBLIC OF KENYA



**Rahman v Thoya; Mugaro t/a Misa Mugaro Auctioneers (Alleged Contemnor)  
(Civil Appeal 78 of 2021) [2023] KEHC 18017 (KLR) (15 May 2023) (Ruling)**

Neutral citation: [2023] KEHC 18017 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MALINDI  
CIVIL APPEAL 78 OF 2021**

**SM GITHINJI, J**

**MAY 15, 2023**

**BETWEEN**

**ABDUL RAHMAN ..... APPELLANT**

**AND**

**STEPHEN ITHA THOYA ..... RESPONDENT**

**AND**

**SAMUEL MISA MUGARO T/A MISA MUGARO AUCTIONEERS .... ALLEGED  
CONTEMNOR**

*(Being an appeal from the judgment and decree of the learned Chief  
Magistrate Hon. Dr. Julie Oseko in Civil Suit No. 133 of 2019 in the  
Chief Magistrate's court at Malindi delivered on the 4th February, 2021)*

**RULING**

**CORAM:** Hon. Justice S. M. Githinji

Mr Otara Advocates for the Appellant

Mr Wambua Kilonzo Advocate for the Respondents

1. This finding is in respect to the Appellant's Notice of Motion dated January 24, 2022 in which the Appellant seeks the following orders;
  1. Spent.
  2. That the Respondent together with his agent Samuel Misa Mugaro t/a Misa Mugaro Auctioneers be committed to jail for a term not exceeding six (6) months for disobeying the court orders issued on September 7, 2021.



3. That any purported sale of the Appellant's motor vehicle registration number KBW 577P-Toyota Landcruizer be declared null and void.
  4. That the honourable court be pleased to order the production of the Appellant's motor vehicle registration number KBW 577P-Toyota Landcruizer before court by Samuel Misa Mugaro t/ a Misa Mugaro Auctioneers and/or by any third party to whom the motor vehicle was sold pending hearing and determination of this application.
  5. That upon production of the Appellant's motor vehicle registration number KBW 577P-Toyota Landcruizer, the honourable court be pleased to order that the Appellant's said motor vehicle be stored at Malindi Police Station and/or any other place the court may deem fit pending the hearing and determination of the appeal.
  6. That in the alternative to prayer 3 above, the Respondent, jointly with his agent/auctioneer namely Samuel Misa Mugaro t/s Misa Mugaro Auctioneers be ordered to pay to the Appellant/ Applicant the sum of Kenya Shillings Three Million Five Hundred Thousand (Kshs 3,500,000/=) being the value of the Appellant's motor vehicle purportedly sold.
  7. That costs to this application be provided for.
2. In support of the Application are the grounds set out on the face of the motion and the supporting affidavit sworn on January 24, 2022 by the Appellant. The gist of the application is that following an ex-parte judgment delivered in Malindi CMCC 133 of 2019, on February 4, 2021, the Appellant instructed his advocates to file an application for stay of execution, setting aside the impugned judgment and reinstatement of the suit. That application was eventually dismissed by the lower court vide a ruling dated August 31, 2021, which is the subject of this appeal.
  3. Alongside the appeal was an application dated September 1, 2021 filed by the Appellant seeking orders inter alia, stay of execution pending the determination of that application inter-parties. Consequently, the Hon. Lady Justice Ong'injo granted a temporary stay of execution pending inter-parties hearing of that application. These orders were issued on September 7, 2021.
  4. The Appellant averred that despite the interim stay of execution, the Respondent through the auctioneer proceeded to sell the Appellant's attached motor vehicle KBW 577P-Toyota Landcruiser, in secret without advertising the same as required by law. It is this sale that prompted the filing of the present application.
  5. The Respondent opposed the application. He filed a Replying Affidavit sworn on February 2, 2022 by his advocate, Mr. Geoffrey Kilonzo who deposed that the orders of September 7, 2021 were never served upon the auctioneer and that the receipt signature appended to the said orders was forged. Counsel added that the application had been overtaken by events since the subject motor vehicle had lawfully been sold to a third party. That on September 30, 2021 when the auction took place, there were no existing orders for stay of execution.
  6. Counsel further deposed that an advertisement for the auction was placed in the Star Newspaper on September 22, 2021, and that the court confirmed the sale on October 15, 2021. According to Mr. Kilonzo, he was only served with stay orders dated November 18, 2021, after the vehicle had already been sold.
  7. Parties agreed to canvass the application by way of written submission which they did. I have carefully considered the notice of motion, affidavits, written submissions and authorities relied on by both parties and find that the following issues arise for determination; -



- i. Whether the said Auctioneer was in contempt of this court orders.
  - ii. Whether the Appellant is entitled to the orders sought.
8. The *Black's Law Dictionary* (Ninth Edition) defines contempt of court as: -
- “Conduct that defies the authority or dignity of a court. Because such conduct interferes with the administration of justice, it is punishable usually by fine or imprisonment.”
9. This Court’s power to punish for contempt is donated by section 5 of the *Judicature Act* which provides; -
- “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.”
10. In *Doric Industries Limited -v- Aksbrap Real Estate Limited & 2 others* [2015] eKLR, the court extensively discussed the scope of this offence. The court explained; -
- “38. It is the supremacy of the law and the ultimate administration of justice that is usually under challenge when contempt of court is committed. This is so because, a party who obtains an order from Court must be certain that the order will be obeyed by those to whom it is directed. As such, the obedience of a court order is fundamental to the administration of justice and rule of law.
39. A court order once issued binds all and sundry, the mighty and the lowly equally without exception. An order is meant to be obeyed and not otherwise. In *Attorney General v. Times Newspapers Ltd and Another* (1991) 2 All ER 398 it was stated that it was immaterial whether one was a party to a suit or not. That anyone who knowingly impedes or interferes with the administration of justice is guilty of contempt irrespective of whether they are named in the order or not.” (Emphasis mine)
11. It is also trite that the standard of proof in contempt cases is higher than of balance of probabilities. It is therefore necessary that there is proof of existence of a court order before one can complain disobedience thereof. The order must also be clear and unambiguous. The order must have either been served upon the alleged contemnors or that they were aware of the said court order. There should also be evidence of disobedience of the said order. In *Samuel M. N. Mweru & Others -v- National Land Commission & 2 others* [2020] eKLR , the court held; -
- “40. It is an established principle of law that in order to succeed in civil contempt proceedings, the applicant has to prove
- (i) the terms of the order,
  - (ii) Knowledge of these terms by the Respondent,
  - (iii). 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:-

"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:-

- (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's conduct was deliberate."

12. In the present case, the Respondent does not dispute that the vehicle has since been sold by the alleged contemnor. The Respondent's contention is that as at the date of the sale, there were no pending orders in place. It is evident that an order was issued on September 7, 2021 to temporarily stay execution pending the inter-parties hearing scheduled for September 16, 2021. However, it is evident that on that particular date the application was not heard for reasons advanced by the Appellant that the file had not been retrieved from Mombasa where the interim orders were issued.
13. It is also evident that despite this, the Appellant did not make any attempt to seek an extension of the interim orders until on the September 18, 2021 when he filed another application for directions regarding the previous application dated September 1, 2021. What comes out clearly to me is that the interim orders issued on September 7, 2021 technically expired on the September 16, 2021 when the matter was scheduled to be heard. It was incumbent for the Appellant to immediately seek an extension of the same.
14. The purported sale of the vehicle was done on September 30, 2021 and a certificate of sale issued, after the interim orders lapsed. I agree with the learned Counsel for the Respondent that the orders expired/ lapsed and therefore no contempt of Court can hold in the circumstances. In other words, there were no subsisting orders by the time the motor vehicle was sold. The outcome is that, I do not find the Respondent or the alleged contemnor in contempt.
15. Given the above, I find that the application dated January 24, 2022 is devoid of merit and is dismissed with costs to the respondent.

**RULING READ, SIGNED AND DELIVERED VIRTUALLY AT MALINDI THIS 15<sup>TH</sup> DAY OF MAY, 2023.**

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**S.M. GITHINJI**

**JUDGE**

**In the Presence of; -**

1. Mr Kilonzo for the Respondent



2. Mr Otara for the Applicant

**Mr Otara;** -I seek leave to appeal. I also apply for certified copies of the proceedings and ruling.

**Court;** -Application is granted.

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**S.M. GITHINJI**

**JUDGE**

**15.5.2023**

