



**Miyare v Planet Motors Company Ltd (Civil Appeal E227 of 2020)  
[2023] KEHC 18923 (KLR) (Civ) (15 June 2023) (Ruling)**

Neutral citation: [2023] KEHC 18923 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**CIVIL**

**CIVIL APPEAL E227 OF 2020**

**CW MEOLI, J**

**JUNE 15, 2023**

**BETWEEN**

**GEORGE OUMA MIYARE ..... APPELLANT**

**AND**

**PLANET MOTORS COMPANY LTD ..... RESPONDENT**

**RULING**

1. For determination is the motion dated 10.09.2021. The events leading up to the same are as follows. George Ouma Miyare (hereafter the Respondent) lodged an appeal dated 02.10.2020 accompanied by a motion under urgency of even date seeking various reliefs. On 08.10.2020 the hearing of the motion proceeded ex parte as Planet Motors Co. Ltd (hereafter the Applicant) failed to file a response or attend the matter despite service.
2. The court allowed the motion dated 02.10.2020 by issuance of orders to the effect that there shall be stay of proceedings in Nairobi MCCCOSU No. E573 of 2020 pending hearing and determination of the appeal; that motor vehicle registration number KCK 999F - Toyota Land Cruiser Prado (hereafter suit motor vehicle) be immediately released from police custody and be restored to the Respondent on condition that the Respondent does not dispose of the vehicle until the appeal is heard and determined; and that the costs be in the appeal.
3. The Applicant thereafter moved the court vide a motion dated 22.10.2020 seeking inter alia that the court be pleased to set aside the exparte orders issued on 08.10.2020 pending hearing and determination of the appeal; that the court be pleased to grant an order that the suit motor vehicle be attached and placed in the officer in charge Kileleshwa Police Station for safe custody pending the hearing and determination of the appeal; and that honorable court be pleased to order the OCS Kileleshwa Police Station to assist in the enforcement of the court orders.



4. The motion as canvassed and vide a ruling delivered on 04.03.2021, the court retained its earlier orders issued on 08.10.2020 upon a further condition that; the Respondent do deposit security in the sum of Kshs. 3,300,000/- in a joint interest earning bank account in the name of the Advocates for the parties herein or in court or in the alternative to deposit sufficient security in court for the sum of Kshs. 5,000,000/- within thirty (30) days from the date of the ruling; and in default the instant motion to stand allowed as prayed.
5. The Respondent on his part subsequently moved the court vide another motion dated 25.03.2021 seeking among others that the court be pleased to review, vary and or set aside its ruling or decision delivered on 04.03.2021 and the consequential orders; and that in the alternative the honorable court be pleased to enlarge time for the depositing of security for a further sixty (60) days. The motion was similarly canvassed and vide a ruling delivered on 28.07.2021, the court dismissed the motion however extended the time within which to deposit security for a further thirty (30) days from the date of the ruling.
6. It is on the premise of foregoing that the Applicant has now moved this court vide the instant motion seeking inter alia that the court be pleased to cite the Respondent for contempt of this court's order issued on the 28.07.2021 and further to order that he be committed to civil jail for a term not exceeding six (6) months. The motion is expressed to be brought pursuant to Section 5(1) of the Judicature Act and Order 51 Rule 1 of the Civil Procedure Rules among others.
7. The grounds on the face of the motion are amplified in the supporting affidavit sworn by Muhammed Faraz, who describes himself as a Director of the Applicant, conversant with the facts, competent and duly authorized to depose. Rehashing the history of the matter, he proceeds to assert that thirty (30) days have lapsed since the ruling of the court delivered on 28.07.2021 and the Respondent has totally failed to abide by the court orders issued on 04.03.2021.
8. That the Respondent has in the same vein willfully refused to deliver for safe custody the suit motor vehicle to Kileleshwa Police Station pending hearing and determination of the appeal. He asserts that to defeat the Applicant's rights to the suit motor vehicle, the Respondent has deactivated the suit motor vehicle's tacker and has further hidden the vehicle which matter he has reported to Kileleshwa Police Station vide OB No. 16/07/09/2021.
9. That the Respondent was well aware of the order's issued on 28.07.2021 as he personally attended court during delivery of the ruling as such the suit motor vehicle which is duly registered in the name of the Applicant is in danger of being wasted and misused by the Respondent who is in unlawful possession and custody of the same. He further asserts that despite correspondence urging the Respondent to abide by the terms of the orders of the court he has willfully refused to comply. In conclusion he avows that court orders are binding and parties are enjoined to obey the same as such the Respondent should be cited for contempt and committed to civil jail for failing to abide by orders of the court.
10. The Respondent filed a replying affidavit dated 11.02.2022 in opposition to the motion. He attacks the motion by stating that the same is misconceived, misplaced, inimical to the overriding objectives of the civil procedure and is an abuse of the court process thus liable for striking out and or dismissal in limine. He too restates the events leading hereto and takes issue with motion on grounds that the court did not issue any orders on 28.07.2021 requiring him to deliver the suit motor vehicle to police custody or an order capable of violation as alleged.
11. He asserts that save for costs; the orders issued on 28.07.2021 were self-enforcing whereas the same automatically lapsed following default in depositing security within the enlarged period of thirty (30)



- days. He further contends that the court order having lapsed, the same are non-existent and incapable of compliance, violation or enforcement as sought through the instant motion. That the orders sought to be enforced by his committal to civil jail are susceptible to subjective interpretation and ambiguous and do not warrant the penalty of imprisonment. He finally deposed that the Applicant has failed to establish that he is in willful violation of the orders of court issued on 28.07.2021 to which he had adequate notice as such the motion ought to be dismissed with costs.
12. The motion was canvassed by way of written submissions. Counsel for the Applicant anchored his submissions on the decision in *Samuel M. N. Mweru & Others v National Land Commission & 2 Others [2020]* eKLR concerning the essential elements to be proved to make a case on contempt. On terms of the order, it was submitted that the orders of the court issued on 28.07.2021 were fashioned in a clear, unambiguous, and unequivocal manner whereafter the Applicant took the liberty of extracting the said order issued by the court.
  13. Regarding knowledge of the order, counsel relied on the decisions in *Basil Criticos v Attorney General & 8 Others & 4 Others [2014]* eKLR and *Shimmers Plaza Limited v National Bank of Kenya Limited [2015]* eKLR to submit that the Applicant is not under a mandatory obligation to effect personal service of the order for the Respondent to be considered as having knowledge of it. That the Applicant need only demonstrate that the contemnor had knowledge of the order or acted in such a way that shows he had knowledge of the order as proof of service. It was argued that the Respondent is an advocate and he personally appeared in court when the ruling was delivered on 28.07.2021 therefore he had full knowledge and notice of the order.
  14. Addressing the court on the Respondent's failure to comply with the order issued on 28.07.2021, counsel submitted that it has been over a year since the order in question was issued and the Respondent has totally failed to abide by the same. The effect of one of the orders issued on 28.07.2021 was the return of the suit motor vehicle to Kileleshwa Police Station for safe keeping pending hearing of the appeal whereas the Respondent has since deactivated the car tracking system to defeat the order issued on 04.03.2021. In conclusion, counsel submitted that the Applicant has demonstrated that the contemnor has deliberately and willfully disobeyed the orders of this court therefore the Applicant's motion ought to be allowed with costs.
  15. On his part, the Respondent anchored his submissions on the decision in *North Tetu Farmers Co. Ltd v Joseph Nderitu Wanjobi [2016]* eKLR on the essential ingredients that ought to be proved in a contempt application. Counsel went on to submit that the burden of proof in contempt proceedings is usually higher than in normal civil proceedings as it involves possible deprivation of a person's liberty. In response to the Applicant's submissions on unambiguity of the order issued on 28.07.2021, counsel citing the decision in *Kenya National Union of Teachers & 2 Others v Teachers Service Commission [2018]* eKLR to contend that the order issued by the court did not require the Respondent to deliver the suit motor vehicle to police custody and thus the said orders are not capable of violation by the Respondent as alleged.
  16. Further that, clause (1) of the order issued on 28.07.2021 is a negative order and does not require performance and or action by the Respondent or any party whereas clause (2) is self-executory in its entirety and is thus incapable of being disobeyed. It was further submitted that the latter was time bound, which time lapsed on 27.08.2021 upon default in depositing security as ordered. Counsel argued that the order were self-enforcing and the same automatically lapsed following default in depositing security within the enlarged period of 30 days which was inadvertent. That in any event the orders issued by the court are susceptible to subjective interpretation and are ambiguous, so as to warrant the penalty of the Respondent's imprisonment.



17. Regarding knowledge of the order, counsel countered by submitting that the Applicant has not tendered any evidence showing that the Respondent had knowledge or proper notice of the terms of the order and or violated the same. That the orders issued on 28.07.2021 merely dismissed the Respondent's motion for review and extended the time within which to deposit security. It was further asserted that failure to deposit security imposed by the court was due to lack of funds at the time and not out of willful neglect. Whereas the desire and intention to deposit was evinced by the Respondent's motion for extension of time within which to deposit.
18. That the orders of 28.07.2021 do not impose the purported duty asserted by the Applicant and the motion is misconceived and intent on frustrating the determination of the appeal. While calling to aid the decision in *Chemwolo & Another v Kubende [1986]* KLR 492, counsel argued that the Applicant has not proved willful disobedience of this court's orders and that unless there is fraud, there is no error or default that cannot be put right by an award of costs as courts exist to uphold parties' right and not to impose discipline. The court was urged to dismiss the motion with costs.
19. The court has considered the rival affidavit material and submissions in respect of the motion as well as the record herein. The court is called upon to determine whether the Respondent is in contempt of the orders of this court issued on 28.07.2021.
20. It is trite that court orders are not made in vain; the party against whom they are directed must obey the order. In *Kyoga Hauliers Limited v Long Distance Truck Drivers & Allied Workers Union [2015]* eKLR the Court of Appeal held as follows:-

“The power to deal with contempt of court is provided for under Section 5(1) of the *Judicature Act*, Section 63(c) of the *Civil Procedure Act* and Order 40 Rule 31 of the Civil Procedure Rules. Of importance in the determination of this issue is however Section 5(1) of the *Judicature Act*, since Section 63(c) of the *Civil Procedure Act* and Order 40 Rule 31 of the Civil Procedure Rules are concerned with disobedience of an order of temporary injunction and resultant consequences which are punishment in the form of imprisonment or attachment and sale of the contemnor's property.”

See also *Christine Wangari Gachege v Elizabeth Wanjiru Evans & 11 others [2014]* eKLR

21. *Black's Law Dictionary* (Ninth Edition), defines contempt of court as “conduct that defies the authority or dignity of a court.” The Court of Appeal in *Christine Wangari Gachege v Elizabeth Wanjiru Evans & 11 Others [2014]* eKLR held that in punishing contempt the court exercises ordinary criminal jurisdiction. In *Stewart Robertson v Her Majesty's Advocate, 2007 HCAC 63* it was stated that:

“Contempt of court is constituted by conduct that denotes willful defiance of or disrespect towards the court or that willfully challenges or affronts the authority of the court or the supremacy of the law, whether in civil or criminal proceedings.”

22. The Supreme Court of Kenya in *Republic v Ahmad Abolfathi Mohammed & Another (2018)* e KLR explained the reason why courts punish contempt as follows :-

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“(24) In *Econet Wireless Kenya Ltd v. Minister for Information & Communication of Kenya & Another [2005]* 1 KLR 828 Ibrahim J (as he then was) relied on the Court of Appeal decision in *Gulabchand Popatlal Shah & Another Civil*



Application No. 39 of 1990 (unreported), where the Court of Appeal stated as follows:

“It is essential for the maintenance of the Rule of Law and order that the authority and the dignity of our Courts are upheld at all times. The Court will not condone deliberate disobedience of its orders and will not shy away from its responsibility to deal firmly with proved contemnors... In *Hadkinson v. Hadkinson* (1952) 2 All E.R. 567, it was held that:

It is the 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 void.”...

(26) The Court of Appeal in *A.B. & Another v R.B.*, Civil Application No. 4 of 2016 [2016] eKLR cited with approval the Constitutional Court of South Africa’s decision in *Burchell v. Burchell*, Case No.364 of 2005 where it was held:

“Compliance with court orders is an issue of fundamental concern for a society that seeks to base itself on the rule of law. *The Constitution* states that the rule of law and supremacy of *the Constitution* are foundational values of our society. It vests the judicial authority of the state in the court and requires other organs of the state to assist and protect the court. It gives everyone the right to have legal disputes resolved in the courts or other independent and impartial tribunals. Failure to enforce court orders effectively have the potential to undermine confidence in recourse to law as an instrument to resolve civil disputes and may thus impact negatively on the rule of law.”...

(28) It is, therefore, evident that not only do contemnors demean the integrity and authority of Courts, but they also deride the rule of law. This must not be allowed to happen...” (emphasis mine)

23. The Supreme Court proceeded to explain the rationale for the high standard of proof of contempt as follows:

“[28]....We are also conscious of the standard of proof in contempt matters. The standard of proof in cases of contempt of Court is well established. In the case of *Mutitika v. Baharini Farm Limited* [1985] KLR 229, 234 the Court of Appeal held that:

“In our view, the standard of proof in contempt proceedings must be higher than proof on the balance of probabilities, almost but not exactly, beyond reasonable doubt...The standard of proof beyond reasonable doubt ought to be left where it belongs, to wit, in criminal cases. It is not safe to extend it to an offence which can be said to be quasi-criminal in nature.”

“[29] The rationale for this standard is that if cited for contempt, and the prayer sought is for committal to jail, the liberty of the contemnor will be affected. As such, the standard of proof is higher than the standard in civil cases. This power, to commit a person to jail, must be exercised with utmost care, and exercised only as a last resort. It is of utmost importance, therefore, for the respondents to establish that the alleged contemnor’s conduct was deliberate, in the sense that he or she willfully acted in a manner that flouted the Court Order.



[30] The question that begs an answer, thus, is: did the applicant willfully disobey this Court's Orders?"

24. The two related ingredients of willful disobedience and knowledge of the order are critical in a successful contempt proceeding. In the past, it was held by superior courts that for an applicant to succeed in contempt proceedings, he must prove personal service of the subject orders and the attendant penal notice upon the alleged contemnor. See the Court of Appeal decision in *Nyamongo & Another v Kenya Posts and Telecommunications Corporation [1994]* KLR 141.
25. In recent years however, superior courts have stated that where the applicant is able to demonstrate awareness by such alleged contemnor of the orders and not necessarily personal service of the order upon the contemnor, such awareness is sufficient. See *Kenya Tea Growers Association vs Francis Atwoli & Others [2012]* eKLR. Notably, the courts emphasize the high degree of proof required, and reiterating the exhortations in *Mutikika v Babarini Farm Limited [1985]* KLR 227, that:-

“A contempt of court is an offence of a criminal character. A man may be sent to prison. It must be proved satisfactorily.... It must be higher than proof on a balance of probabilities, almost but not exactly, beyond reasonable doubt. The standard of proof beyond reasonable doubt ought to be left where it belongs, to wit criminal cases. It is not safe to extend it to offences which can be said to be quasi-criminal in nature.

However, the guilt has to be proved with such strictness of proof as is consistent with the gravity of the charge... Recourse ought not to be had to process of contempt of court in aid of a civil remedy where there is any other method of doing justice. The jurisdiction of committing for contempt being practically arbitrary and unlimited, should be most jealously and carefully watched and exercised with the greatest reluctance and the greatest anxiety on the part of the judge to see whether there is no other mode which is not open to the objection of arbitrariness and which can be brought to bear upon the subject... applying the test that the standard of proof should be consistent with the gravity of the alleged contempt... it is competent for the court where contempt is alleged to or has been committed, and or an application to commit made, to take the lenient course of granting an injunction instead of making an order for committal or sequestration, whether the offender is a party to the proceedings or not.”

26. In this case it is important to note that the Respondent wears both the hat of counsel and party. That said, there is no dispute that orders were issued on 28.07.2021 and despite the Respondent being present when the ruling was delivered, the Respondent's firm was duly served with the orders in question.
27. The purport of the order has been vehemently disputed by the Respondent. The Respondent argues that court did not issue any orders on 28.07.2021 requiring him to deliver the suit motor vehicle to police custody or an order capable of violation as alleged whereas the orders issued therein were self-enforcing automatically lapsed following default in depositing security within the enlarged period of thirty (30) days. As such a non-existent order is incapable of compliance, violation or enforcement as sought through the instant motion.
28. He further contended that the orders sought to be enforced by his committal to civil jail are susceptible to subjective interpretation and too ambiguous to warrant the penalty of imprisonment as sought. On the part of the Applicant, it was argued that the orders of the court issued on 28.07.2021 were fashioned in a clear, unambiguous, and unequivocal manner and that the Applicant took the liberty of extracting and serving the same.



29. Evidently, the parties' interpretation and apprehension of the purport of the order issued on 28.07.2021 are at variance. The court gathers from the Respondent's arguments that the order the Applicant's seeks to cite him for contempt ought to be read in isolation and hence does not meet necessary threshold for contempt because of its ambiguity. The Applicant's approach towards the motion is that the events and orders leading to the order issued 28.07.2021 ought to be holistically considered and consequently, the Respondent should be cited for contempt.
30. In the court's considered view, and for the purpose of the present motion, the orders of 28.07.2021 cannot be read in isolation. To give context, the orders issued on 28.07.2021 arose from the Respondent's motion dated 25.03.2021 seeking the review, variation and or setting aside of the court's ruling or decision delivered on 04.03.2021 and the consequential orders; and that in the alternative the honorable court be pleased to enlarge time for the depositing of security for a further sixty (60) days.
31. The orders issued in respect of the decision delivered on 04.03.2021 were that the court retained its earlier orders issued on 08.10.2020 upon a further condition that the Respondent does deposit security in the sum of Kshs. 3,300,000/- in a joint interest earning bank account in the name of the Advocates for the parties herein or in court or in the alternative to deposit sufficient security in court for the sum of Kshs. 5,000,000/- within thirty (30) days from the date of the ruling; and in default the motion under consideration to stand allowed as prayed.
32. The default clause adverted to orders sought by the Applicant to the effect that court do set aside the exparte orders issued on 08.10.2020 pending hearing and determination of the appeal; that the court be pleased to grant an order that the suit motor vehicle be attached and placed in the officer in charge Kileleshwa Police Station for safe custody pending the hearing and determination of the appeal; and that court be pleased to order the OCS Kileleshwa Police Station to assist in the enforcement of the court orders.
33. The earlier orders that were to be retained on condition of default were that there would be be stay of proceedings in Nairobi MCCCOSU No. E573 of 2020 pending hearing and determination of the appeal; that motor vehicle registration number KCK 999F - Toyota Land Cruiser Prado (hereafter suit motor vehicle) be immediately released from police custody and be restored to the Respondent on condition that the Respondent does not dispose of the vehicle until the appeal is heard and determined; and that the costs be in the appeal. On 28.07.2021 the court dismissed the Respondent's review motion however extended the time within which to comply with deposit of security for a further thirty (30) days from the date of the ruling.
34. The court understands from the foregoing that the orders issued on 28.07.2021 were not issued in isolation, but in a sequential and related series of orders arising from motions starting with the Respondent's motion dated 02.10.2020 and ending with the Respondent's motion dated 25.03.2021. The effect of the orders issued on 28.07.2021 was that Respondent was granted and a further 30 days within which deposit security in the sum of Kshs. 3,300,000/- in a joint interest earning bank account in the name of the Advocates for the parties herein or in court or in the alternative to deposit sufficient security in court for the sum of Kshs. 5,000,000/-. The dismissal of the review prayer meant that in the event of failure on the part of Respondent to deposit within 30 days of the ruling delivered on 28.07.2021, the default clause in the order issued on 04.03.2021 was activated.
35. The fact of the Respondent's awareness of the series of orders herein resting with the order that is the subject of the present application is beyond any serious contention. What the court must decide is whether the latter order was ambiguous or whether the Applicant has made out a clear case that the Respondent is in contempt of the court's said subject order issued on 28.07.2021. At present, the suit motor vehicle appears to be in the possession and custody of the Respondent pursuant to the



orders issued by the court on 08.10.2020. A further review of the series of orders issued on 08.10.2020, 04.03.2021 and 28.07.2021 save for the issue of deposit of security reveals no identifiable positive order against the Respondent in respect of the suit motor vehicle.

36. From the earlier recital of earlier proceedings, there is no ambiguity here as to the consequences of default by the Respondent in respect of the orders of 28.07.2021. The Respondent's failure to comply with deposit orders would clearly affect the initial orders issued on 08.10.2020, and the Respondent appears to admit such default only urging a selective reading of the orders on record. However, the standard of proof in a contempt application is higher than balance of probabilities but almost, but not exactly beyond reasonable doubt. See *Republic v Ahmad Abolfathi Mohammed & Another (supra)*.
37. Rather than file the present application for contempt, the Applicant ought to have availed itself of the default clause and extracted for execution the orders resulting from default, to the effect inter alia, that the "suit motor vehicle be attached and placed in the custody of officer in charge Kileleshwa Police Station for safe custody pending the hearing and determination of the appeal; and that..... the OCS Kileleshwa Police Station... to assist in the enforcement of the court orders".
38. The contempt application is not appropriate in this case, given the circumstances outlined, nature of orders sought to be enforced and high threshold in contempt applications. By virtue of the Respondent's default on deposit of security, the proceedings in Nairobi MCCCOSU No. E573 of 2020 can potentially proceed. Secondly, as the suit motor vehicle was already released to the Respondent, the Applicant is at liberty given the Respondent's default, to obtain appropriate orders to secure possession of the vehicle in accordance with the orders activated by default. In the result, the motion dated 10.09.2021 must fail and is dismissed. The parties will bear their own costs, however.

**DELIVERED AND SIGNED ELECTRONICALLY AT NAIROBI ON THIS 15<sup>TH</sup> DAY OF JUNE 2023.**

**C.MEOLI**

**JUDGE**

**In the presence of:**

For the Applicant: Mr. Omondi

For the Respondent: Mr. Mutuku

C/A: Carol

