



**Sang v Garam Auctioneers & another; Kipketer (Interested Party); Kipketer (Third party) (Civil Case E002 of 2020) [2023] KEHC 18968 (KLR) (16 June 2023) (Ruling)**

Neutral citation: [2023] KEHC 18968 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT ELDORET  
CIVIL CASE E002 OF 2020  
RN NYAKUNDI, J  
JUNE 16, 2023**

**BETWEEN**

**PETER KIPSIGEI SANG ..... APPLICANT**

**AND**

**GARAM AUCTIONEERS ..... 1<sup>ST</sup> DEFENDANT**

**NCBA KENYA PLC ..... 2<sup>ND</sup> DEFENDANT**

**AND**

**SAMMY KIPKETER ..... INTERESTED PARTY**

**AND**

**BEATRICE JERUTO KIPKETER ..... THIRD PARTY**

**RULING**

- 1 The applicant approached this court vide a Notice of Motion dated 9<sup>th</sup> November 2022 seeking the following orders;
  1. That the Honourable court do issue summons to the Interested party, Sammy Kipketer Cheruiyot and Beatrice Jeruto Kipketer, the third interested party, to attend to and to appear before the honourable Court on a date to be determined to show cause why they should not be committed to civil jail or penalized.
  2. That the interested party, Sammy Kipketer Cheruiyot and Beatrice Jeruto Kipketer, the proposed interested party be committed to civil jail or penalized on terms that the Court shall deem just for deliberately/blatantly disobeying court orders issued on the 4<sup>th</sup> Day of June 2022.
  3. That the Honourable Court issue further orders that will uphold and protect the authority and dignity of the Court.



4. That the cost of this Application be provided for.
- 2 The application is premised on the grounds set out therein and the contents of the affidavit in support of the same.
- 3 The parties filed submissions on the application.

### **Applicant's Case**

- 4 Learned counsel for the applicant submitted that there have been a number of cases that have been determined with regards to what constitutes Contempt of Court. That the case of Alfred Mutua v Boniface Mwangi [2022] eKLR borrowed heavily from the English Statute as to the elements of the offence. The elements have not been outlined expressly by our Jurisprudence but the Courts have been alluding to them as to them being present for one to be regarded as having committed this offence.
- 5 Counsel referred the court to Rule 81.4 of the English Civil Procedure Rules (Amendment No.3) Rules, 2020 that provides for the requirements of a contempt application. He urged that on 4<sup>th</sup> October 2022, the Court directed that the above-mentioned information be availed to the Applicant within 14 days by the third and interested parties. The Applicant has not received the said information and therefore the parties are in breach of the said Order. He posited that it is worth noting that the Court had competent jurisdiction to issue the said order and the Respondents were obliged to comply or even Appeal which they never did. As it stands the Order still stands and the Respondents are in breach of it.
- 6 He urged that the respondent's actions are a blatant disregard of the authority of this court which is evidenced by the fact that the Order issued on 4<sup>th</sup> October 2022 was a follow up from the Order issued on 9<sup>th</sup> June 2022. Counsel submitted that on the date the Order in question was issued, the interested parties were physically present in Court together with their Advocates and further, that the orders were arrived at by way of a Consent Order recorded between the Third Party the Interested Party and the Plaintiff in open Court. Three months and counting have lapsed as opposed to the stated period of 14 days for compliance but still they have not complied. Counsel cited Econet Wireless Kenya Ltd v Minister for Information & Communication of Kenya & another [2005] KLR 828, Ibrahim, J. (as he then was) and submitted that the applicant has demonstrated that the Contemnors have blatantly failed to obey the Court Orders notwithstanding that they had three months and were given a second chance to amend their wrongs.
- 7 Counsel prayed the application be allowed with costs and the contemnor be condemned to pay the same.

### **Third Party's Case**

- 8 Learned counsel for the third party filed submissions on 5<sup>th</sup> April 2023. It was his case that the orders made on 9<sup>th</sup> June, and 4<sup>th</sup> October were not served properly on the Interested Party. Further, that the interested and third party were not a party to the suit at the time when the consent was instituted. Counsel urged that the contempt had not been proved and relied on the case of Titus Musyoki Nzioka v John Kimathi Maingi & another [2013] eKLR in support of this submission.
- 9 Learned counsel submitted that the interested party cannot be held liable for contempt in the circumstances. That there is no evidence that they were served with an order and further, that having been made a party subsequent to the issuance of the order of status quo, one would expect that an order would be extracted and served upon the interested party with a penal notice. Counsel cited the cases



of Africa Management Communication International Limited v Joseph Mathenge Mugo & another [2013] eKLR and Katsuri Limited v Kapurchand Shah [2016] eKLR in support of this submission.

10 Counsel urged the court to dismiss the application with costs.

### **Analysis & Determination**

11 Upon considering the application and the responses thereto, I have identified the following issues for determination;

1. Whether the interested parties are in contempt of court
2. Whether warrants of arrest should issue

### **Whether the interested parties are in contempt of court**

12 The current legislation that guides courts on contempt of court is section 5 of the *Judicature Act* Cap 8 Laws of Kenya. That section provides:

- (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 that power shall extend to upholding the authority and dignity of 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 In the Court of Appeal case of Christine Wangari Gachege vs. Elizabeth Wanjiru Evans & 11 Others [2014] eKLR recognised that the only statutory basis for contempt of court law in so far as the Court of Appeal and the High Court are concerned is section 5 of the *Judicature Act*.

14 Under Rule 81.4 of the English Civil Procedure Rules (Amendment No. 3) Rules, 2020 provides for the requirements of a contempt application and provides that:

- (1) Unless and to the extent that the court directs otherwise, every contempt application must be supported by written evidence given by affidavit or affirmation.
- (2) A contempt application must include statements of all the following, unless (in the case of (b) to (g)) wholly inapplicable—
  - (a) the nature of the alleged contempt (for example, breach of an order or undertaking or contempt in the face of the court);
  - (b) the date and terms of any order allegedly breached or disobeyed;
  - (c) confirmation that any such order was personally served, and the date it was served, unless the court or the parties dispensed with personal service;
  - (d) if the court dispensed with personal service, the terms and date of the court's order dispensing with personal service;
  - (e) confirmation that any order allegedly breached or disobeyed included a penal notice;
  - (f) the date and terms of any undertaking allegedly breached;
  - (g) confirmation of the claimant's belief that the person who gave any undertaking understood its terms and the consequences of failure to comply with it;



- (h) a brief summary of the facts alleged to constitute the contempt, set out numerically in chronological order;
- (i) that the defendant has the right to be legally represented in the contempt proceedings;
- (j) that the defendant is entitled to a reasonable opportunity to obtain legal representation and to apply for legal aid which may be available without any means test;
- (k) that the defendant may be entitled to the services of an interpreter;
- (l) that the defendant is entitled to a reasonable time to prepare for the hearing;
- (m) that the defendant is entitled but not obliged to give written and oral evidence in their defence;
- (n) that the defendant has the right to remain silent and to decline to answer any question the answer to which may incriminate the defendant;
- (o) that the court may proceed in the defendant's absence if they do not attend but (whether or not they attend) will only find the defendant in contempt if satisfied beyond reasonable doubt of the facts constituting contempt and that they do constitute contempt;
- (p) that if the court is satisfied that the defendant has committed a contempt, the court may punish the defendant by a fine, imprisonment, confiscation of assets or other punishment under the law;
- (q) that if the defendant admits the contempt and wishes to apologise to the court, that is likely to reduce the seriousness of any punishment by the court;
- (r) that the court's findings will be provided in writing as soon as practicable after the hearing; and
- (s) that the court will sit in public, unless and to the extent that the court orders otherwise, and that its findings will be made public.

15 In *Sheila Cassatt Issenberg & another v Antony Machatha Kinyanjui* [2021] eKLR Justice C. Mwita pronounced himself as follows;

16 The Cromwell J, writing for the Supreme of Canada in *Carey v Laiken*, 2015 SCC 17 (16<sup>th</sup> April 2015), expounded on the three elements of civil contempt of court which must be established to the satisfaction of the court, thus:

- i) The order alleged to have been breached “must state clearly and unequivocally what should and should not be done.” This ensures that a party will not be found in contempt where an order is unclear. An order may be found to be unclear if, for example, it is missing an essential detail about where, when or to whom it applies; if it incorporates overly broad language; or if external circumstances have obscured its meaning.
- ii) The party alleged to have breached the order must have had actual knowledge of it. It may be possible to infer knowledge in the circumstances, or an alleged contemnor may attract liability on the basis of the wilful blindness doctrine.



- iii) The party alleged to be in breach must have intentionally done the act that the order prohibits or intentionally failed to do the act that the order compels. (emphasis)
- 16 The upshot of the foregoing is that an applicant must prove that;
1. The order was served
  2. There was breach of the order
  3. The parties understood the consequence of breach
- 17 I have considered the respondents' submissions and note that they vehemently deny having been served with the order. Upon perusing the record of the court, the orders given on 4<sup>th</sup> October 2022 were given in the presence of the third party and the interested party and the court read the consent order to the parties before granting the same. It follows that there is no requirement for service of the order in the circumstances.
- 18 The orders pertained to provision of information to the court and as there is no evidence of any information having been provided to the court with regards to the details of the tenants occupying the premises, amount of rent due from each tenant monthly and the full statement of arrears, it is clear that they have not complied. Further, in their responses, they have not bothered to address this issue. They maintained that they were not served with the order, confirming non compliance by playing blind to orders that were issued when they were in court.
- 19 The parties understood the consequence of breach as it was a condition of non-compliance that they be cited for contempt. It follows that the respondents are in contempt of the court orders issued by this court on 4<sup>th</sup> October 2022

#### **Whether warrants of arrest should issue**

- 20 Section 5(2) of the *Judicature Act* provides as follows;
- (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.
- 21 In the case of *Alfred Mutua v Boniface Mwangi* [2022] eKLR Justice G.V Odunga 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.
- 23 Dealing with the question of contempt in *Econet Wireless Kenya Ltd v Minister for Information & Communication of Kenya & another* [2005] KLR 828, Ibrahim, J. (as he then was), underscored the importance of obeying court orders, stating:
- 24 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. It is the plain and unqualified obligation of every person against whom an order is made by court of competent jurisdiction, to obey it unless and until the 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 the order believes it to be irregular or void. (emphasis)



25 Having found that the application is merited, I hereby cite the third party and the interested party for contempt and direct that warrants of arrest do issue against Beatrice Jeruto Kipketer and Sammy Kipketer Cheruiyot.

26 The respondents shall bear costs of the application. It is so ordered.

**DELIVERED, DATED AND SIGNED AT ELMORE ON THIS 16 DAY OF JUNE 2023**

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**R. NYAKUNDI**

**JUDGE**

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