



REPUBLIC OF KENYA



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**Kevin Kipkosgei t/a Kogo Auctioneers & another v Kipsang (Civil Appeal
E192 of 2022) [2023] KEHC 20204 (KLR) (17 July 2023) (Judgment)**

Neutral citation: [2023] KEHC 20204 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
CIVIL APPEAL E192 OF 2022
RN NYAKUNDI, J
JULY 17, 2023**

BETWEEN

KEVIN KIPKOSGEI T/A KOGO AUCTIONEERS 1ST APPELLANT

MWANANCHI CREDIT LIMITED 2ND APPELLANT

AND

BENJAMIN NGETICH KIPSANG RESPONDENT

JUDGMENT

1. The appeal herein arises from a ruling delivered on 14th December 2022 in Eldoret Chief Magistrates Court Miscellaneous Civil Application No. 173 of 2022 wherein the trial court cited the appellants for contempt of court and issued a warrant of arrest and committal to civil jail of the 1st appellant and the 2nd appellant's Principal Legal Officer to pay a fine of Kshs. 100,000/- each failure to which they would serve six months' imprisonment.
2. Being aggrieved with the ruling, the appellants instituted the present appeal vide a memorandum of appeal dated 8th February 2023 premised on the following grounds;
 1. That the learned trial magistrate erred in law and in fact by finding the appellants in contempt of court.
 2. That the learned trial magistrate erred in law and in fact by sentencing the appellants to six months in jail.
 3. That the learned trial magistrate erred in law and in fact by sentencing the appellant to an alternative fine of Kshs. 100,000/-.
 4. That the learned trial magistrate erred in law and in fact by arrogating himself powers and jurisdiction that he does not have.



5. That the learned trial magistrate erred in law and in fact by applying the wrong provisions of the law and legal principles.
 6. That the learned trial magistrate erred in law and in fact by finding the appellants in contempt of the court yet no opportunity to show cause was ever presented to them.
 7. That the learned trial magistrate erred in law and in fact by finding the appellants in contempt of a court order of another court without meeting the necessary evidentiary threshold required by the law.
 8. That the learned trial magistrate erred in law and in fact by holding the appellants in contempt of court orders despite discharging its own orders.
 9. That the learned trial magistrate erred in law and in fact by entertaining a defective application by the respondent did not meet the legal provisions of the law.
 10. That the learned trial magistrate erred in law and in fact by failing to uphold the principal that once orders are given in a miscellaneous application the same is dispensed with and a court becomes functus officio.
 11. That the learned trial magistrate erred in law and in fact by holding the 2nd appellant in contempt despite the fact that it was not party to the proceedings in court.
 12. That the learned trial magistrate erred in law and in fact by failing to hold the parties in contempt yet the application and order issued by the court is in respect of a different motor vehicle.
 13. That the learned trial magistrate erred in law and in fact by ignoring and or failing to consider the 1st appellants replying affidavit and oral submissions made in court.
 14. That the learned trial magistrate erred in law and in fact by failing to appreciate that section 151 of the [Public Health Act](#) can only be implemented by the County Government officials or anyone acting under their instructions.
3. The appellants filed submissions on the appeal.

Appellants' case

4. Learned counsel for the appellant submitted that the magistrate erred in both law and fact by holding the appellants in contempt of court. He urged that the [contempt of court act](#) was found to be unconstitutional in *St Mary Academy Limited & Another v Grace Njeri Mukora & Another; Yvonne Jeruto & another (Contemnors) [2021] eKLR*. Further, that judge John M. Mativo highlighted the principles that one has to satisfy in order to succeed in civil contempt proceedings in *Samuel M. N Mweru & Others v National Land Commission & 2 others (2020) eKLR*. Based on the foregoing principles, counsel submitted, the respondent failed to meet the threshold required.
5. Counsel submitted that the trial magistrate failed to consider the 1st appellants' replying affidavit that he was an auctioneer who was not party to the original suit and was not aware of the status quo. He maintained that the respondent failed to prove contempt of a court order as per the required standard of proof. He urged that the appellants believed genuinely that they were entitled to act as they did since the borrower was enjoying the use of the vehicle and by being a defaulter, the 2nd appellant had the right to instruct the 1st appellant to repossess the car. Further, that the 1st appellant admitted in his replying affidavit that he noted with a lot of concern that the miscellaneous application made to court had an



error on the registration number of the vehicle thus there was no mischief as alleged by the respondent. He maintained that the actions of the appellants were not in any way deliberate nor intentional.

6. Counsel submitted that the trial magistrate erred by failing to give them an opportunity to show cause why they should not be held liable in the contempt proceedings thus offending the principle of natural justice. Further, that the respondent did not meet the threshold for contempt orders as there was no contempt of court order emanating from Kisumu CMCC E295 of 2022, adding that the court is still handling the case and has the capacity to handle the contempt of court application. He maintained that the 1st appellant was not aware of the proceedings in Kisumu as he was only acting on limited instruction issued to him by the 2nd appellant.
7. The appellant submitted that the respondents' application dated 24th November 2022 was brought under incorrect provisions and thus the trial magistrate erred in entertaining it. Further, that the court became functus officio as the proceedings had been concluded when the order was perfected and the same could only have been challenged through an appeal process. The trial magistrate lacked the powers to revoke or vary the orders issued on 14th November 2022.
8. Counsel maintained that the trial magistrate erred in holding the 2nd appellant liable for contempt of court orders yet he was not a party to the application. The appellants urged the court to allow the appeal with costs.

Analysis & Determination

9. In *Abok James Odera T/A A.J Odera & Associates v John Patrick Machira T/A Machira & Co. Advocates* [2013] eKLR, the court stated as follows-

This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and re-analyze the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way.”

10. An appellate court will only interfere with the judgment of the lower court, if the said decision is founded on wrong legal principles. That was the holding of the Court of Appeal in *Mkube v Nyamuro* [1983] LLR at 403, where Kneller JA & Hancox Ag JJA held that-

A Court on appeal will not normally interfere with the finding of fact by a trial court unless it is based on no evidence, or on a misapprehension of the evidence, or the judge is shown demonstrably to have acted on wrong principles in reaching his conclusion.

11. Upon consideration of the memorandum of appeal, record of appeal and submissions, the following issues emerge for determination;

Whether the trial court erred in finding the appellant in contempt of court

12. The appellants contended that the application dated 24th November 2022 was brought under the wrong legal principles. The impugned application was brought under Order 6, Rule 1, Order 10, Rule 11, Order 22, Rule 22 of the Civil Procedure Rules and sections 3A and 63(e) and 80 of the *Civil Procedure Act*. This Court has however previously held that in the spirit of Article 159 (2) of *the Constitution* and Section 1 A and B of the *Civil Procedure Act*, failure to cite the correct provisions of law is not fatal and would not per se warrant a dismissal of the application. (See *Meru Misc. Civil Application No. E007 of 2021 Purity Kagendo Anampiu & Another vs Nellie Mugambi & Another*.)



See also Kenya Trypanosomiasis Research Institute v Anthony Kabimba Gusinjilu (Suing for and on behalf of 112 Plaintiffs) Civil Appeal No. 212 of 2015 [2019] eKLR.)

13. The Court will therefore go into the merits of the application.
14. Magistrates have powers under Section 10 of the Magistrates' Act to hear and punish for contempt arising out of their decisions. 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:

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)

15. In Ramadhan Salim v. Evans M. Maabi T/A Murphy Auctioneers and Another (2016)eKLR the court 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 Magistrate's Courts Act, 2015 which came into force on 2nd January 2016 now gives the magistrate's courts unlimited jurisdiction to punish for contempt..."

16. The Miscellaneous Application dated 10th November 2022 was filed by the 1st appellant wherein he sought orders from the trial court to authorise him to break into the respondents' premises or any other premises that motor vehicle registration no KBZ 257Y is kept for purposes of distraining the same. The trial court granted the orders sought on 14th November 2022. The Respondent herein then filed the application dated 24th November 2022 in the trial court seeking orders that the court summon the advocate for the applicant, the appellant herein and the legal officer Mwananchi Credit to explain to the court how the execution was conducted while there exist stay orders prohibiting repossession of the suit vehicle. He also sought orders for a Notice to Show Cause to be issued to the aforementioned parties why they should not be committed to civil jail. The applicant sought that the respondents be compelled to pay the applicant damages for loss of user and damage occasioned by the illegal repossession.
17. The appellants' contention is that the 1st appellant was not a party to the original suit in Kisumu and thus he was not aware of the status quo. Counsel went on to state that the 2nd appellant was led to believe that the borrower who had defaulted in his loan repayment was hiding behind the orders of status quo in Kisumu. This was a clear admission that he was well aware of the existence of a court order. Despite knowledge of the existence of the order he went ahead to instruct the 2nd appellant to execute the orders. The 2nd appellants' actions are nothing else but deliberate and wilful disobedience of the court order because of his belief that the borrower was hiding behind status quo orders. Rather than challenge the status quo orders in court, the appellant decided to ignore them altogether.
18. The 2nd appellant was an interested party in Kisumu CMCC E295/2022. The 2nd appellant instructed the 1st appellant to institute the application as is expressed in the certificate of urgency on the application dated 10th November 2022. It is clear that they were aware of the existence of the court orders in Kisumu before they approached this court.



19. The notion that the contempt of court orders could only be issued by the court in Kisumu CMCC E295/2022 as it was handling the matter is indicative of an unfortunate comprehension of the orders by the court. The contempt in this particular case was not as a result of the proceedings in Kisumu CMCC E295/2022 but as a result of the abuse of the court process that was committed in seeking orders to repossess the car while aware there were orders to maintain the status quo. I am in agreement with the trial court that this disrupts the court process and undermines public confidence in the court. However, I note that the 1st Appellant was not a party to the suit in Kisumu CMCC E295 of 2022. There is no evidence that the 1st appellant had knowledge of the existence of the court orders and therefore it is my considered view that the trial court erred in finding the 1st appellant in contempt.
20. The appellants were issued with summons to attend court and cannot claim that there was a breach of the rules of natural justice. The trial magistrate did not err in holding the 2nd appellant in contempt as it misled the court in the process of obtaining the orders the appellants state had already been discharged. The applicant brought it to the attention of the court that the parties had abused the court process and therefore, the court had to act to protect its independence and dignity. As such, it would be moot to suppose that the court was functus officio.
21. It is therefore my considered view that the appeal succeeds to the extent that the orders for contempt against the 1st appellant are set aside. The orders as to a fine of Kshs. 100,000/- in default of which the 2nd appellants' principal legal officer shall serve six months in civil jail are upheld.
22. It is so ordered.

DELIVERED, DATED AND SIGNED AT ELDORET ON THIS 17TH DAY OF JULY 2023

R. NYAKUNDI

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JUDGE

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

