



**Muchemi & 2 others v Macharia & another (Miscellaneous Application 506 of 2016)
[2021] KEHC 347 (KLR) (Commercial and Tax) (10 December 2021) (Ruling)**

Neutral citation: [2021] KEHC 347 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
MISCELLANEOUS APPLICATION 506 OF 2016
MW MUIGAI, J
DECEMBER 10, 2021
IN THE MATTER OF THE ARBITRATION ACT (NO.4 OF 1995) AS AMENDED BY**

BETWEEN

**NDIRITU MICHAEL MUCHEMI 1ST CLAIMANT
JULIUS IRUNGU NGIGI 2ND CLAIMANT
WANGOMBE HUMPHREY 3RD CLAIMANT**

AND

**ASHBELL WACHIRA MACHARIA 1ST RESPONDENT
GITHUI MURIITHI PETER 2ND RESPONDENT**

RULING

PLEADINGS

NOTICE OF MOTION DATED 26TH MAY, 2021

1. The Applicant sought the followings orders;
 1. That this Court finds the respondents in contempt of this Court's orders for failing to comply with the said Orders to with to pay Kshs.1,167,590/- and Kshs.286,720/- being the claimants share of the costs paid to the arbitrator by the Claimants within 14 days as ordered by this Court on the 16th day of March 2021.



2. That this Court orders such punishment and/or fine as it deems fit for the said contempt of the court Orders and there be continued such punishment until compliance.
3. That the costs of this Application be provided for.

SUPPORTING AFFIDAVIT

4. THAT by an AWARD dated the 9th day of April, 2015, the Respondents were ordered to execute Resignation Letters as Directors and Transfer of shares of M/S Pentapharm Limited to the claimants.
5. That despite several orders of this Court affirming the same the Respondents have refused, ignored, rejected and blatantly refused to obey the said orders.
6. That Court orders are not made in vain and should be obeyed by all and sundry.
7. That the Respondents have been duly served with the Orders/Decree and have ignored to comply.
8. That it is in the interest of justice that the Respondents are held in contempt of court orders granted accordingly.
9. That I annex herein the Award and the decree marked 'NMM2' and Affidavits of Service.
10. That this Court should also take judicial notice that the applicants have trying to fight the Decree/Award in the various Applications filed herein as proof of service and knowledge of the said court Orders.
11. That what is deponed to herein is true and of the claimant knowledge, save as to matters of information sources whereof have been disclosed.

REPLYING AFFIDAVIT

Claimant /Respondent responded as follows;

12. The allegation that warrants in issued were issued after the Applicant had complied with the Court order to have Ksh 3,132,561/-deposited in joint Accounts of the parties advocates' is further from the truth , the applicant's Counsel refused to execute transfer the transfer of funds forms to have the funds released alleging that he was sickly[yet] when process was served on him he was found in the office and this prompted the Claimants to instruct Counsel to apply for warrants.
13. The Applicant has never been intent on obeying and Court orders and is in contempt of Court orders and therefore not deserving of any equitable relief as he and his Co applicant blatantly refused to execute their resignation letters and transfer of shares as ordered in the award and decree.
14. The Applicants aver that the Claimants are required to seek rectification of the award prior to execution of the award cannot be true as shown by Ruling of Hon G. Nzioka J of 13th November the Court had/has no jurisdiction to



amend the Award. The claimants have no alternative but to enforce the award as is.

15. The costs in the warrant of attachment are costs paid to the Arbitrator and awarded by the Court. The instructions to the Auctioneers are lawful legal and in tandem with the Decree and the Ruling of this Court of 16th March 2021 to comply within 14 days.

NOTICE OF MOTION DATED 17TH MAY, 2021

The Applicant also filed the instant application and sought orders as follows;

16. Pending hearing and determination of this application there be an order directed against James Kimani t/a Cash Auctioneers to return to the 1st respondent herein the attached motor vehicle registration KCM 020 G.
17. Pending hearing and determination of this application there be a stay of sale of the attached motor vehicle registration KCM 020 G.
18. There be a stay of execution of the warrant of attachment and sale of movable property issued on 5th May, 2021 by this court to Messrs, Cash Auctioneers.
19. This Court orders that the 1st Respondent's motor vehicle registration KCM 020G was unlawfully attached by Messrs, Cash Auctioneers.
20. This Court orders than no further execution should ensue against the 1st Respondent by virtue of having settled the decretal sum of Kshs.3,132,561.00

2. The Applicant relied on the following grounds as set out in the application herein that:-

1. By Ruling delivered on 16th March, 2021, this Court ordered inter alia that the sum of Kshs.3,132,561.00 deposited in a joint escrow account at ABC Bank in the names of the parties' advocates be released forthwith to the Claimants.
2. Despite the compliance with this Court's orders, the Claimants Counsel has instructed Messrs, Cash Auctioneers to attach the 1st Respondent's motor vehicle registration KCM 020 G in execution of the sum 3,334,661.58.
3. The Claimant's advocate has issued further instructions to Cash Auctioneers to execute against the 1st Respondent for the sum of Kshs.1,243,785.24. This Court has previously held that the said sum is payable by the 2nd Respondent and the Claimants are required to seek rectification of the award prior to execution of the same.

REPLYING AFFIDAVIT

3. The Respondent in Opposition to the Notice of Motion dated 23rd February, 2021 deposed;

1. He wrote through his advocate on separate dates to wit 27th July, 2020, and 1st December, 2020. The letters are yet to elicit a response. Copies of the letters are exhibited at pages 5 to 8.



2. The sum deposited in the escrow account was meant to be utilized towards settlement of any amounts owed to the creditors of the company (Pentapharm) and not for personal use. However, should the Claimants wish to utilize the said funds for personal use, it would only be fair that they exonerate the Respondents first from any liabilities.
3. The Respondents have not refused to make payment to the Claimants as ordered in the decree of this Court.
4. FURTHER AFFIDAVIT IN RESPONSE TO THE REPLYING AFFIDAVIT DATED 23RD FEBRUARY, 2021:

The 1st Respondent stated as follows;

5. In response to paragraph 5, the truth of the matter is that the Claimants' Counsel refused to comply with the escrow account opening requirements and the money would not have been released until such compliance. My advocates had to plead with the bank to release the funds despite the non-compliance. Copies of emails from the Bank requesting compliance from the Claimants' counsel are exhibited at pages 5 to 10.
6. In reply to paragraph 6, have duly executed the resignation letter as a director of Pentapharm together with the co-respondent and all the requisite documents have been forwarded to the Companies' registry. These documents have also been sent to the Claimants' counsel and in any event they can be re-sent if they were not received. Copies of the executed resignation letters, Companies' registry forms are exhibited at pages 11 to 15.
7. In response to paragraphs 7, 8, 9 and 10, he already settled the decretal sum as required in the decree. The Claimants had sought in the Statement of Claim before the Arbitrator the sum of Kshs. 3,132,561.00 against me and the sum of Kshs.1,167,590.00 against the 2nd Respondent.

3. The claimants filed a Notice of Motion dated 19th March 2019 where they sought inter alia:

1. Upon being converted, the said decree be executed to recover the sum of Kshs.3,132,561.00 from the 1st Respondent and Kshs.1,167,590.00 from the 2nd Respondent.

CLAIMANTS SUBMISSIONS

2. The warrants pending are with regard to the Arbitrators Legal Fees where the Respondent paid Ksh 286,720/- and Ksh 208,875 awarded by Arbitrator as costs. These proceedings are not an appeal on the said decree as per the Court orders and Proclamation.
3. If the Applicant wanted to pursue rectification, then steps would have been taken to do so Section 34 of *Arbitration Act* gives the Arbitrator 30 days to correct typographical errors and the Court lacks the jurisdiction to correct the same.

RESPONDENTS SUBMISSIONS



4. They submitted that this Court is a court of justice and its fundamental duty is to exercise its wide discretion to grant relief that the ends of equity and justice demand. The High Court of India in *Mam Raj vs Smt. Sabiri Devi and Ors* on 19th March, 1998 held as follows:

It is settled principle of law that the court necessarily need not be guided by the provisions of law under which the application is made. The court has to look into the contents of the application and the prayer made of such basis. What is to be seen is whether the applicant is entitled to the relief prayed for in the facts and circumstances of the case. The court is not powerless to grant relief, if the ends of justice and equity demands because the powers vested in the court under Section 151 of the CPC are of wide scope and ambit.

5. In *Trusted Society of Human Rights Alliance -vs- Cabinet Secretary for Devolution and Planning & 3 others* [2017] eKLR has adopted the above decision and held that the Courts are vested with the discretion to do real and substantial justice to the parties. Mativo J held in his decision as follows:-

The inherent power, as observed by the Supreme Court to India “has not been conferred on the court; it is a power inherent in the court by virtue of its duty to do justice between the parties before it.”

4. The fundamental duty of the court is to do justice between the parties. Discussing the nature and objects of the inherent powers of the court, Sir Dishah Mulla in the *Code of Civil Procedure* observes that:-

“The Court has, therefore, in many cases, where the circumstances so require, acted upon the assumption of the possession of an inherent power to act ex debito justitiae, and to do real and substantial justice for the administration, for which alone, it exists....”

Discretion vested in the court is dependent upon various circumstances, which the court has to consider among them the peculiar facts of each case and the need to do real and substantial justice to the parties to the suit and that discretion must be exercised in accordance with sound and reasonable judicial principles including the interests of justice and the need to uphold the rule of law.

DETERMINATION

5. The Court considered the pleadings and submissions by parties through Counsel and the issues for determination are;
1. Contempt of this Court’s orders for failing to comply with the said Orders to with to pay Kshs.1,167,590/- and Kshs. 286,720/- being the claimants share of the costs paid to the arbitrator by the Claimants within 14 days as ordered by this Court on the 16th day of March, 2021.
 2. The Court grants an order against James Kimani t/a Cash Auctioneers to return to the 1st Respondent herein the attached Motor Vehicle registration KCM 020 G and pending hearing and determination of this application there be a stay of sale of the attached motor vehicle registration KCM 020 G.



6. The Applicant is seeking an order that the Defendant/Respondents are committed to civil jail for a period not exceeding six months or attach their property or impose such penalty as the court may deem fit for contempt of court for disobeying the orders of this Court of 16th March 2021 and previous Court orders.
7. In *North Tetu Farmers Co. Ltd v Joseph Nderitu Wanjohi* [2016] eKLR the Court observed; Section 5 of the [Judicature Act](#) which provides as follows:-
 - (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.
8. In [Econet Wireless Kenya Ltd vs Minister for Information & Communication of Kenya & Another Ibrahim J \(as he then was\)](#) 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. It is the plain and unqualified obligation of every person against or in respect of whom, an order is made by 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."
9. Although the contempt of Court proceedings is civil in nature, it is well established that an Applicant ought to prove the elements beyond reasonable doubt, at least higher than the standard in civil cases. The fact that the liberty of the defendants could be affected means that the standard of proof is higher than the standard in civil cases. It is incumbent on the Applicant to prove that the defendants' conduct was deliberate in the sense that he or she deliberately or willfully acted in a manner that breached the order.
10. The power to commit for contempt is one to be exercised with great care. An order committing a person to prison for contempt is to be adopted only as a last resort. The Court orders emanate from the Final Award and 2 Rulings of this Court. Knowledge of the order is not disputed. What is contested is enforcement and/or execution of the Court orders as alleged disobedience.
11. The Final Arbitral Award was published on 9th April 2015. This Court set out the Findings and Conclusions by the Arbitrator in its Ruling of 16th March 2021, where the Ksh 3,132,561/- deposited in an escrow account was released to the Claimants on medical grounds.
12. Therefore, the Decree in question that indicated as follows;

the said decree be executed to recover the sum of Kshs.3,132,561.00 from the
1st Respondent and Kshs.1,167,590.00 from the 2nd Respondent.
13. The Claimants explained that the decree was drawn as shown above because, the respondents and/or their advocate failed to comply with the Court order that funds be released to be employed in urgent medical expenses incurred by one of the Claimants.



14. Be that as it may, since the Respondents thereafter complied, it was incumbent for the Claimants to have withdrawn and/or amended the decree removing the amount released Kshs.3,132,561.00, once the Respondents complied with the Court Order to release the funds to the Claimants.
15. Final Arbitral Award published on 9th April 2015 and served to the parties' advocates on 13th April 2015. The Applications to set aside/ stay the Arbitral Award application was dismissed by Hon L.J.Olga Sewe on 14th September 2016. Immediately after the Ruling, Applicant's advocate wrote to Respondent advocates for the costs to be paid to avoid further costs and payment was never made. By Ruling by Hon L.J Nzioka of 13th November 2019, the Final Arbitral Award was recognized and adopted as an order of the Court and converted into a decree for execution. By the Ruling of this Court of 16th March 2021, 'all the terms of the Final Award shall be complied with by the parties within 14 days'
16. From the above outline, the decree was a legal order from the Court save for the fact that once part of the decretal amount was paid and released to the Claimants, the decree was to be amended to reflect the outstanding amount; that is;
 - a. The 1st Respondent [should read 2nd Respondent as clarified to be typographical error by Arbitrator at Pg 8 1st -4 lines of Arbitral Award] shall pay to the Claimants Ksh 1,167,590.00
 - b. The Respondents shall reimburse to the Claimants the amount remitted by the latter as Arbitrator's costs herein."
17. Therefore, it is the 2nd Respondent to pay Ksh 1,167,590/- to Claimants and not the 1st Respondent as expounded in the Arbitrator's award. Both Respondents shall settle their share of Arbitrators' Fees paid by the Claimants on their behalf. The Respondents did not deliberately or willfully act in a manner that breached the order in the circumstances as there has ben contention regarding the typographical error in the Final Award that the 1st Respondent was to pay Ksh 1,167,590/-. The Court lacks jurisdiction to amend/alter arbitral award save for applying Section 35 ,36 & 37 of Arbitration Act
18. To set aside the award. Secondly, it is 6 years since the Final Award was published, parties ought to have taken back the Award for clarification, amendment or correction 30 days thereafter as prescribed under Section 34 of the Arbitration Act which period elapsed. This Court found clarity at Pg 8, 1st -4 lines of Arbitral Award. Now the matter is settled ,the 2nd Respondent shall pay Ksh 1,167,590/-and both Respondents pay their part of Arbitrator.
19. The Court finds that the Respondents are not in contempt of Court orders and shall be granted 30 days to comply with the remaining orders as per the Final Award, the Court Rulings and Decree save for Kshs.3,132,561.00 as released to the Claimants in compliance with the Court orders.
20. On the question of James Kimani t/a Cash Auctioneers executing the decree by attachment of the 1st Respondent it is confirmed that Kshs.3,132,561.00 was paid and does not form part of the decree for execution. Once, Ksh 286,720/- ; the Respondents' share of Arbitrator's Fees and Auctioneers Fees are paid the motor vehicle Reg KCM 020 shall be released to the 1st Respondent.

DISPOSITION

1. Notice of Motion dated 26th May, 2021 for contempt of court orders is dismissed



2. Notice of Motion dated 17th May, 2021 for release or stay of sale of motor vehicle is granted subject to payments settled as per the Final Award and subsequent Court orders
3. Each Party to bear own costs.

**DELIVERED SIGNED & DATED IN OPEN COURT ON 10TH DECEMBER
2021(VIRTUAL CONFERENCE)**

M.W.MUIGAI

JUDGE

