



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MIGORI**

**[Coram: A. C. Mrima, J.]**

**CIVIL APPEAL NO. 79 OF 2018**

**TRANS MARA SUGAR CO. LTD.....APPLICANT/APPELLANT**

**-VERSUS-**

**HOSEA MUGA.....RESPONDENT**

**-AND-**

**OSCAR ODHIAMBO ODONGO.....INTERESTED PARTY**

**RULING NO.1**

1. The application subject of this ruling is the Notice of Motion dated 11/07/2018. The application sought the following orders: -

**1) The instant application be certified urgent and the same be heard exparte in the first instance.**

**2) Pending the determination of this instant application, the Honourable court be pleased to order for the immediate release of vehicle registration number KBY 315 Y illegally attached after the order of this court had been issued and served and impugned any intended sequestration and/or sale of the said vehicle as the same was criminally and illegally attached in contempt of an order from this court despite the same having been properly served on the 1<sup>st</sup> respondent.**

**3) Punishment of the respondents for contempt of a lawful and valid court order and for pretending not to be aware of a court order when the same was legally and effectively served to a fine not exceeding two hundred thousand shillings or to imprisonment for a term not exceeding six months, or to both.**

**4) An order directing the Auctioneers registration Board to suspended the 2<sup>nd</sup> respondent pending the determination of this application.**

**5) General damages for all losses suffered by our client as a result of your illegal attachment and damages for any damage caused to the vehicle illegally attached.**

**6) Costs of the appeal do abide in the cause.**

2. The application was made on the 14 grounds appearing on the face thereof and was supported by the Affidavit sworn by the Applicant's Legal Officer one **Mr. Emmanuel Seriani** on 11/07/2018.

3. The Respondent vehemently opposed the application. He filed a Replying Affidavit he swore on 15/12/2018.

4. The Applicant successfully applied for the enjoinder of an Auctioneer one Oscar Odhiambo Odongo as an Interested Party. The Auctioneer also opposed the application. He filed a detailed Replying Affidavit which he swore on 14/05/2019.

5. The Respondent and the Auctioneer applied to cross-examine Mr. Emmanuel Seriani on the contents of his said affidavit. The examination was done.

6. The application was thereafter heard by way of written submissions. Parties highlighted on their respective submissions.

7. I have carefully considered the application. It is in the nature of a contempt of Court application. I am reminded by the Court of Appeal in

***We reiterate that contempt proceedings being of quasi - criminal in nature and since a person may lose his right to liberty, each stage and step of the procedure must be scrupulously followed and observed.***

***We bear in mind the often-cited passage attributed to Lord Denning in Re Bramblevale Ltd {1970} 1 CH 128 at page 137 that;***

*A contempt of court is an offence of criminal character. A man may be sent to prison for it. It must be satisfactorily proved showing that when the man was asked about it, he told lies. There must be some further evidence to incriminate him”*

8. The starting position is how the application was tailored. I have replicated the application above. Prayer 2 thereof seems to be the gist of the application. The prayer in essence sought the release of Motor Vehicle registration number KBY 315Y pending the determination of the application. There is no substantive prayer for any party to be cited for contempt of court. The rest of the prayers seem to ride on the derailed presumption that prayer 2 sought to cite some people for contempt of court. However, that presumption is largely misplaced.

9. Prayer 2 sought an interim relief pending the determination of the application. The application therefore ought to *inter alia* contain a substantive prayer citing the Respondent and the Auctioneer for contempt of court. That substantive prayer would have been the basis of the rest of the prayers.

10. What is therefore the fate of such an application? The appropriate legal guidance was laid by the Court of Appeal in the foregone decision to wit that ‘... *every stage and step of the procedure must be scrupulously followed and observed.*’ Since the contempt of court proceedings are quasi-criminal in nature it therefore behooves that the application must be succinctly clear on the prayers sought, the parties sought to be cited for the contempt among other legal requirements. In contempt of court proceedings, the application is akin to a charge sheet in criminal proceedings.

11. In an adversarial system of litigation parties are firmly bound by their pleadings. The Court of Appeal in **Independent Electoral and Boundaries Commission & Ano. vs. Stephen Mutinda Mule & 3 others (2014) eKLR** which cited with approval the decision of the Supreme Court of Nigeria in **Adetoun Oladeji (NIG) vs. Nigeria Breweries PLC SC 91/2002** where Sylvester Umaru Onu, JSC stated that: -

***...It is settled law that it is not for the courts to make a case of its own or to formulate its own from the evidence before it and thereafter proceed to give a decision based upon its own postulation quite separate from the case the parties made before it....***

***It is settled law that parties are bound by their pleadings.....the court below was in error when it raised the issue contrary to the pleadings of the parties.’***

12. Adereji, JSC in the same case expressed himself thus on the importance and place of pleadings: -

***....it is now trite principle in law that parties are bound by their pleadings and that any evidence led by any of the parties which does not support the averments in the pleadings, or put in another way, which is at variance with the averments of the pleadings goes to no issue and must be disregarded.....***

***...In fact, that parties are not allowed to depart from their pleadings is on the authorities basic as this enables parties to prepare their evidence on the issues as joined and avoid any surprises by which no opportunity is given to the other party to meet the new situation.***

13. The Supreme Court of Kenya also added its weight on the foregone legal position in a ruling in **Raila Amolo Odinga & Another vs. IEBC & 2 others (2017) eKLR.**

14. Can the saving grace in **Article 159(2)(d)** of the **Constitution** apply in this case? The Supreme Court of Kenya in **Petition No. 5 of 2013 Raila Odinga vs. Independent Electoral and Boundaries Commission & 3 Others** held that: -

***The provisions of Article 159(2)(d) were never meant to oust the obligation of litigants to comply with procedural imperatives as they seek justice from courts of law.***

15. This Court cannot attempt to amend the application. The Applicant never sought leave to amend the application despite the fact that the application took a considerable period to be heard. If the application is to be determined the way it is tailored then there is nothing of substance likely to be achieved. That is because the application ends upon its determination. As said, all the other prayers were hinged on the success of prayer 2.

16. Given the nature of the application I find that the same was a false start. I will not consider the merits thereof. The Notice of Motion dated 11/07/2018 is hereby struck out with costs to the Respondent and the Auctioneer.

Orders accordingly.

**DELIVERED, DATED and SIGNED at MIGORI this 7<sup>th</sup> day of February, 2020**

**A. C. MRIMA**

**JUDGE**

**Ruling delivered in open court and in the presence of: -**

**Mr. Oyagi** Counsel instructed by the firm of Messrs. Oyagi, Onguti, Magiya & Co. Advocates for the Applicant.

**Mr. Gembe** Counsel instructed by the firm of Messrs. Gembe Capis Omollo & Co. Advocates for the Respondent.

**Oscar Odhiambo Odongo** the Auctioneer in person.

**Evelyne Nyauke** – Court Assistant