



**REPUBLIC OF KENYA**

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

**COMMERCIAL & TAX DIVISION**

**HCCC MISC 90 OF 2019**

**STANSHA LIMITED.....PLAINTIFF**

**VERSUS**

**SHEIKH MOTORS LIMITED.....1<sup>ST</sup> DEFENDANT**

**MOHAMMED SULEMAN SHEIKH.....2<sup>ND</sup> DEFENDANT**

**RULING**

The Applicant filed Notice of Motion Application under **Section 10, 5(1) Judicature Act Cap 8 Section 1A, 1B & 3A CPA Order 51 Rule 1, Order 40 Rule 3 of CPR 2010.**

The Applicant sought orders that the Defendants are summoned to Court to appear in person and explain why he is disobeying the Court Order of 6<sup>th</sup> November 2018 issued by the Trial Court **Hon. P.N. Gesora Chief Magistrate Nairobi Law Courts.**

The Applicant also sought orders that the Defendants/Contemnors be committed to Civil jail for 6 months for disobeying the Court order referenced above.

The Applicant also sought orders that the Defendants/Contemnors are ordered to surrender and deliver Motor Vehicle Reg. KBX 764B Mitsubishi & Motor Vehicle KCB 777E Toyota Land Cruiser to the Officer Commanding Flying Squad Nairobi Yard as ordered on 6<sup>th</sup> November 2018.

The Applicant also sought that the Court imposes Ksh 500,000/- penalty in default of payment all his moveable and immovable assets including land and buildings be attached and sold in execution of the Order to satisfy the penalty for contempt.

The grounds are that the Trial Court issued these orders *ex parte*. When served to the Officer Commanding Flying Squad, The Respondent's advocates wrote to the Officer and challenged the order and intimidated the officer in the interpretation of the Court order instead of setting aside the order before Court.

The Contemnor is in breach of the Court order and moved to hide the motor vehicles. The Contemnor wilfully disobeyed the Court orders. The Counsel for the Respondents/Contemnors arrogantly and with great impunity communicated to the Applicant/Counsel with regard to the instant application.

In the circumstances, committal proceedings are the most effective and efficient mode of compelling the Contemnor to obey the Court order and protect dignity of the Court.

The Defendant/Respondent filed Replying Affidavit on 8<sup>th</sup> March 2019.

The Contemnor deposed that the Applicant's application is a litany of lies carefully calculated to mislead the Court.

The Contemnor contested the issue of service. He deposed that the applicant did not/never served the Respondents with the Court order.

The Contemnor learnt of the order when Police Officers from Flying Squad Unit brought the order when they visited the Contemnor's premises with a photocopy of the purported Court order which did not bear the Official Seal of the Court.

The Contemnor contended that Flying Squad Officers are/were not authorized Process Servers and the Order presented was a photocopy.

The Contemnor deposed that the Flying Squad Officer searched his premises and could not find the motor vehicles; the **Motor Vehicle Reg KBX 764 B Mitsubishi & Motor Vehicle KCB 777E Toyota Land Cruiser** were sold at an auction to 3<sup>rd</sup> parties on 30<sup>th</sup> June 2018 pursuant to the **Disposal of Uncollected Goods Act** due to failure of the Applicant to pay the Respondent for services rendered for a period exceeding 1 Year.

The Contemnor stated that he did not have the motor vehicles in his possession or control. He had no prior knowledge of the issuance of the said order, given that it was obtained *ex parte*. He is of the view that he fully complied with the terms of the Court order. The applicant filed the Application fraudulently by misleading the Trial Court in Milimani Commercial courts **Case Number 9007 of 2018**. The Applicant failed to disclose that it failed to pay the Respondent for Professional Fees rendered and issued bad cheques. This non-disclosure of material facts by the applicant was/is aimed at hoodwinking and manipulating the Court to grant orders in blatant disregard of the law, the truth and justice.

The Contemnor instructed his Counsel to file an application to set aside the Orders and is awaiting determination.

## **DETERMINATION**

### **ISSUE**

This Court considered the written submissions of Counsel for the parties and the issue for determination is whether there is contempt of Court by the Defendants of non compliance of Court order(s) issued by the Trial Court Hon. P.N. Gesora Chief Magistrate Nairobi Milimani Law Courts.

**Contempt of Court is defined in Black Law Dictionary as thus;**

***Contempt is disregard of or disobedience to the rules or orders of a legislative or judicial body or an interruption of its proceedings by disorderly behaviour or insolent language, in its presence or so near there to as to disturb the proceedings or to impair the respect due to such body.***

There ought to be proof of service of the Court order by the Applicant to the Contemnor as mandated by the case of **Justus Kariuki Mate & Anor vs Martin Nyaga Wambora [2014]** where the Court of Appeal held;

***‘That an applicant is required to prove that personal service of the Order was effected on the Respondent or in the alternative that the Respondent had knowledge of the order. A person is held to have notice of a fact or condition if that person if he has knowledge of it; Has received information about it has reason to know about it or knows about a related fact.’***

In the instant case, the Trial Court issued Court orders upon the application filed on 9<sup>th</sup> October 2018 as follows;

1. That the application dated 9/10/2018 is stood over to 15/11/2018
2. That the Respondent to be served
3. That pending *inter partes* hearing of this application, there be a temporary injunction restraining the Defendant/Respondent either by themselves or through agents; servants or employees from selling, disposing of transferring leasing vandalizing using and/or dealing with motor vehicles numbers **KCB 764B, KCB 777E, KCH 125W and Toyota Saloon Wish**.
4. That the Officer Commanding Flying Squad Nairobi to assist in removing the said motor vehicles numbers **KCB 764B, KCB 777E, KCH 125W and Toyota Saloon Wish from Respondent’s Yard to the Flying Squad Nairobi for safe custody till further directions by the Court.**

The Court order was/is signed and has a Penal Notice.

The Notice of Motion filed in this Court was served directly to the Respondent as per the Court orders of this Court of 12/2/2019. On 11/3/2019 when both parties were represented by Counsel Mr Ondieki for the Applicant and Dr Ladwa for the Respondents/Contemnors in Court. The Respondent’s advocate confirmed service of the Court order by the Trial Court and informed this Court that they complied. The Respondent’s advocate confirmed that the *ex parte* order was issued without the Respondents having been accorded a hearing. The Respondents filed an application to challenge the impugned orders and the application was dismissed.

On 25<sup>th</sup> March 2019, the Applicant’s advocate confirmed service of Court order and penal notice and informed the Court that the Contemnor was aware of the matter when the Officer Commanding Flying Squad went to effect the Court order at the Contemnor’s premises.

From the above outline this Court finds that the Respondent failed to comply with the Court order of 2<sup>nd</sup> November 2018 because full and frank disclosure on the whereabouts of the motor vehicles was not disclosed before the Trial Court. In the absence of releasing the motor vehicles to the Officer Commanding Flying Squad as ordered then the Contemnor should have appeared in Court in person and/or with Counsel on scheduled date of 15<sup>th</sup> November 2018 to explain the circumstances that hampered /prevented release of the motor vehicles as ordered. Better still, if sale of the motor vehicles was conducted in June 2018, the Contemnor would have presented documents of sale of **KCB 764B, KCB 777E, KCH 125W and Toyota Saloon Wish** disclosing Purchaser(s) Purchase Price(s) and Transfer Forms /Ownership

form(s) Logbook(s). To the Trial Court so as to amend/vary or review/expunge the court orders.

Therefore; in the absence of release of the subject motor vehicles as ordered by the Court order of 2<sup>nd</sup> November 2018 or appearance before the Trial Court to explain any challenge/handicap to prevent compliance or provide proof that at the time the Order was served or he was aware and had knowledge of the matter, he had sold the vehicles and/or returned any or all vehicles to the Applicant and there is cogent/tangible evidence /proof of the same; the Contemnor has not complied with the Court order; he is deemed to have wilfully disobeyed the Court order.

The Contemnor stated that he filed an application before the Trial Court to set aside the Orders, the same was dismissed. The Court orders remain regular, legal and valid order of the Court unless reviewed or appealed against.

In the case of **ECONET WIRELESS KENYA LIMITED vs THE MINISTER FOR INFORMATION & COMMUNICATION OF KENYA & COMMUNICATION COMISION OF KENYA MISC APP 1640 of 2003** it was held in reference to the case of **GULABCHAND POPATLAL SHAH & ANOR**;

***“It is essential for the maintenance of Rule of Law and good order that the authority and dignity of Courts are upheld at all times. This 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 vs HADKINSON (1952)2 ALL ER 567, it was held that ;***

***“It is plain and unqualified obligation of every person against or in respect of; who on order is made by a Court of competent jurisdiction to obey 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 even void.”***

The Contemnor raised issues with regard to non- compliance that ought to be raised during hearing and determination/during *interpartes* hearing before the Trial Court.

Therefore, the allegation that the Application and subsequent orders were overtaken by events, cannot hold true, the Defendants ought to have presented evidence of sale of the motor vehicles under the Disposal of Uncollected Goods Act before the Trial Court. The evidence that the Applicant defaulted in payment of Professional Services to repair the motor vehicles and issued bounced cheques; the fact that the repairs and charges of the vehicles by the Respondent were agreed and authorized between them ought to have been presented to the Trial Court to make an informed decision on whether to vary amend and/or review its orders in light of new developments or to hear the substantive suit/matter *interpartes* on priority basis.

This Court’s mandate is to determine whether the Defendants committed civil contempt in wilful disobedience of Trial Court orders of 2<sup>nd</sup> November 2018 but not hear and determine the rival issues between the parties.

This Court is satisfied by the impugned orders of 2<sup>nd</sup> November 2018, though granted *ex parte*; that the Defendants’ were granted an opportunity of an *inter partes* hearing on 15<sup>th</sup> November 2018. The Defendants were also to be served with the application and order.

The Defendants cannot claim that they were condemned unheard and **Article 50 COK 2010** was not applied. No explanation is given as to what transpired on 15<sup>th</sup> November 2018 nor whether /why the substantive application/matter has not been heard and determined.

This Court sought the original Court file be availed to this Court for perusal alas it was never done. To the extent the parties have filed pleadings in this Court, The Defendants wilfully failed to comply with the Court orders of 2<sup>nd</sup> November 2018 in the absence of appearing before Trial Court and presenting evidence that sale of motor vehicles was lawfully conducted before the advent of the Court orders.

In the case of ***Kenya Human Rights Commission vs Attorney General & Anor [2018]eKLR***, the court declared the entire **Contempt of Court Act no 46 of 2016** invalid for lack of public participation as required by **Art 10 & 118 of COK 2010** and it encroached on the independence of the Judiciary.

Therefore, in the absence of the relevant statutory provisions; this Court shall rely on **Section 5 of Judicature Act** that was repealed by **Section 38 of the now declared unconstitutional Contempt of Court Act**. The Court shall also rely on the inherent and residual jurisdiction of the Court provided by **Section 3A of CPA as was held in *Miguna Miguna vs Fred Matiangi & 8 Others [2018] eKLR***.

The provision formerly **Section 5 of Judicature Act** relates to civil contempt which amounts to disobedience of any judgment, decree direction order or other process of the Court. In the instant case there has flagrant disregard and awful disobedience of court order of 2<sup>nd</sup> November 2019.

## **DISPOSITION**

**1. From the above considerations; the Defendants are found liable for contempt of Court Order of 2<sup>nd</sup> November 2018 and deliberately refused to release the motor vehicles KCB 764B, KCB 777E, KCH 125W and Toyota Saloon Wish knowing there was a subsisting dispute and/or orders from Court.**

**2. The Defendants have not provided tangible/ cogent evidence/proof to confirm regular/legal sale and transfer of the said**

motor vehicles before 2<sup>nd</sup> November 2018.

3. The Defendants upon service /knowledge of *ex parte* orders of 2<sup>nd</sup> November 2018 and had challenge to comply, did not appear/attend Trial Court on 15<sup>th</sup> November 2018 or any other date and explain prevailing circumstances so as to enable the Trial Court consider new facts and make appropriate orders.

4. Therefore, the Defendants shall disclose, avail and release the motor vehicles KCB 764B, KCB 777E, KCH 125W and Toyota Saloon Wish as per the Court order within 14 days from today or

5. The Defendants to present to the Deputy Registrar Commercial Division with list of Documents of Sale of each of the 3 motor vehicles and particulars of the Purchasers, Purchase prices, Transfer Forms & Log books to confirm the sale /transfer.

6. In default; of either requirements/Compliance after 14 days of non -compliance warrant of arrest to issue to the 2<sup>nd</sup> Defendant through Deputy Registrar Commercial Division and to be executed by the Court Bailiff to have the 2<sup>nd</sup> Defendant appear in Court on 28<sup>th</sup> November 2019.

DELIVERED SIGNED & DATED IN OPEN COURT ON 12<sup>TH</sup> NOVEMBER 2019.

M.W.MUIGAI

JUDGE

IN THE PRESENCE OF:

NO APPEARANCE.....FOR PLAINTIFF

NO APPEARANCE.....FOR DEFENDANT

MS JASMINE – COURT ASSISTANT