



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KISII

CIVIL CASE NO. 34 OF 2015

**JULIUS MOGAKA GEKONDE T/A E-SMART TECHNICAL
 COLLEGE....PLAINTIFF/RESPONDENT**

VERSUS

**OURU POWER LIMITED.....1^SDEFENDANT/
 APPLICANT**

**JOSEPH O. NYACHOTI T/A MINMAX AUCTIONEERS.....2ND
 DEFENDANT/APPLICANT**

AND

**SAMWEL NYAGACHO OGERO.....1ST
 OBJECTOR**

**ELKANA ONYANDO.....2ND
 OBJECTOR**

**CONSTANCE MWEMBA LAND TRU SMP CAPITAL LIMITED.....3RD
 OBJECTOR**

RULING

(In respect to applications dated 14th March 2016 and 16th March 2016)

Introduction

1. On or about 1st December 2012, The 1st Defendant leased a portion of his premises situate on LR. NO. KISII MUNICIPALITY/BLOCK III/3, 4, 5 AND 6 (hereinafter “the suit property”), to the plaintiff.
2. On 27th October 2015, the plaintiff sued the defendants claiming, inter alia, damages for illegal distress and an injunction to restrain the defendants from entering the demised premises and taking away the plaintiff’s property, evicting or in any other manner interfering with the plaintiff’s tenancy.
3. Simultaneously with the suit, the plaintiff also applied, by way of Notice of Motion dated 27th October 2015 under certificate of urgency, for orders of temporary injunction to restrain the defendants from trespassing, entering into the demised premises and taking away the proclaimed assets or in any manner interfering with the plaintiff’s tenancy pending the inter-partes hearing and determination of the

application.

4. On 30th October 2016, this court granted the plaintiff's prayer for temporary injunction and set the inter-partes hearing date for 11th December 2015.

5. The parties subsequently agreed to argue the application dated 27th October 2015 by way of written submissions after which a ruling was delivered on 7th March 2016 in the following terms:

a) The prayer for interim orders of injunction in the 1st application is hereby allowed BUT the same shall be in force for 15 days only to allow the plaintiff settle all the rents due and owing to the defendant failure of which the said interim orders shall automatically lapse and/or stand vacated and the 1st defendant shall be at liberty to issue a fresh proclamation notice for purposes of levying distress for the rent arrears due.

b) The plaintiff's motor vehicle registration number KBY 187A Isuzu Bus shall be released forthwith and unconditionally to the plaintiff by the defendants.

c) The proceedings before the Kisii Chief Magistrates Court in Civil Misc. Application No. 14 of 2015 between the plaintiff and the 2nd defendant are hereby stayed for 15 days in line with order no. 1 herein above.

d) Any claim that the plaintiff may have in respect to the alleged damage to the Motor Vehicle may be canvassed in the main suit.

e) The costs of the applications shall abide the outcome of the main suit.

6. It is the said ruling of 7th March 2016 that has precipitated the 2 applications dated 14th (hereinafter "the 1st application") and 16th March 2016 (hereinafter "the 2nd application"), that are the subject of this ruling.

7. When the two applications came up before me for hearing on 7th June 2016, the parties agreed to canvass them by way of written submissions.

Application dated 14th March 2016

8. The 1st application was filed by the defendants under **Order 45 Rules 1, 2 and 4 of the Civil Procedure Rules** in which they sought the following orders:

1. Spent

2. Pending the hearing and determination of the instant application, the Honourable court be pleased to grant an interim order of stay of execution, enforcement and/or implementation of the orders of this Honourable Court made and/or rendered on the 7th day of March 2016, more particularly, the limb whereby the Honourable Court ordered and/or directed the release of Motor Vehicle Registration Number KBY 187A, Isuzu Bus, to the plaintiff/Respondent herein.

3. The Honourable Court be pleased to Review and/or vary the Ruling and/or order of this Honourable court rendered on the 7th day of March 2016, more particularly, the limb whereby the Honourable Court ordered the release of Motor Vehicle Registration Number KBY 187A, Isuzu Bus, to the plaintiff/respondent herein.

4. Costs of this Application be borne by the plaintiff/Respondent.

5. Such further and/or other orders be made as the court may deem fit and expedient.

9. The application is supported by the affidavit of JOSEPHAT O. NYACHOTI the 2nd defendant herein, dated 14th March 2016 in which he states that indeed there was a landlord/tenant agreement between the plaintiff and the 1st defendant but that, following the plaintiff's default in payment of rent, the 1st defendant instructed to levy distress against the plaintiff's property. He contends that on 29th October 2015, he attached a motor omnibus Reg. No. KBY 187A, Isuzu Bus (hereinafter "the suit bus") which was advertised and sold on 18th November 2015 to recover the rent arrears. He adds that that the issue of the sale of the bus was not brought to the attention of the court on 17th November 2015 when the parties filed their respective affidavits and consequently, there exists new and important evidence that needs to be brought before the court for determination through a review.

10. He further contends that there was no order stopping him from attaching or levying distress for rent as at 2^{9th} October 2015 when he attached the suit bus and that upon carrying out the said attachment he was enjoined by the law to advertise and sell the suit bus within 7 days from the date of seizure. He reiterates that since the suit motor vehicle had already been sold as at 7th March 2016, the limb of the court order directing the release of the suit omnibus becomes incapable of implementation and/or enforcement thereby necessitating the need for a review of the said orders.

11. In response the application dated 14th March 2016, the plaintiff filed a statement of grounds of opposition in which he listed the following grounds:

- 1. There are no sufficient grounds for bringing the application as envisaged under order 45 Rule 1 of the Civil Procedure Rules.**
- 2. The Motor Vehicle Registration Number KBY 187A Isuzu Bus could not be sold as alleged without disobeying this court's orders of injunction issued on 30th day of October 2015.**
- 3. The Motor Vehicle Registration Number KBY 187A Isuzu Bus could not and was not sold as alleged on the face of the orders made on 17th day of November 2015 in CM Misc. Application No. 114 of 2015.**
- 4. There was no Public Auction which took place on 18th day of November 2015 as the plaintiff/Respondent and the process server were on the site before the time of scheduled for sale.**
- 5. The Motor Vehicle Registration Number KBY 187A Isuzu bus has been in the yard of the 2nd Defendant/Applicant at Mairi Mbili along Kisii – Keroka Highway and was moved away immediately after the delivery of this court's ruling sought to be reviewed.**
- 6. The Application is made in bad faith with the object of obstructing the cause of justice.**
- 7. The Applicants are by their conduct treating the orders of the courts with contempt and are acting with impunity.**
- 8. The Application is incompetent and an abuse of the court process.**
- 9. There is nothing new and important evidence which was not within the knowledge of the Applicants at the time of canvassing the application.**
- 10. The Application is an afterthought calculated to sanitize the illegal actions of the Defendants.**

12. The plaintiff also filed a replying affidavit dated 31st March 2016 in which he stated that he is aware

that this court issued an order of injunction on 30th October 2015 which were promptly served upon the defendants on 2nd November 2015. He further states that upon learning of an advertisement for sale of the suit motor vehicle, made in the Star Newspaper, he on 17th November 2015 sought and obtained orders in the Kisii CMCC Misc. Application 114 of 2015 to stay the sale which orders he served on the defendants as shown in annexure “JMG2” attached to his affidavit.

13. The plaintiff contends that on 18th November 2015 he stayed at the site of the intended sale of the suit motor vehicle and confirmed that no sale ever took place as alleged as the 2nd defendant was reportedly away in Eldoret for a funeral. He further states that he was aware that the suit motor vehicle was all along in the 2nd defendant’s yard till 7th March 2016 when this court delivered its ruling and further that the defendants had ample opportunity to bring the issue of the alleged sale to the attention of the court which chance the defendants did not utilize.

Application dated 16th March 2016

14. The 2nd application is filed by the plaintiff under Order 40 Rule 3 of the Civil Procedure Rules in which he seeks the following orders:

1. Spent

2. That the pending inter-partes hearing of this application there be an order authorizing and empowering the officer commanding Kisii Police station (OCS) to search, arrest and detain the said Motor Vehicle registration number KBY 187A ISUZU BUS at Kisii Police Station until further orders of this court.

3. That this honourable Court do find that the 1st and 2nd Defendants/Respondents are guilty of disobedience and/or in breach of a court order having disobeyed this court’s orders made on 7th March 2016 by refusing to release the Motor Vehicle registration Number KBY 187A ISUZU BUS upon service of the order to the Plaintiff/Applicant.

4. That this Honourable Court be pleased to order that the property of the 1st and 2nd Defendants in disobedience and/or breach of the terms of the said court order be attached and that the 1st and 2nd Defendants be detained in prison for a term not exceeding six (6) months.

5. That there be an order cancelling the license of the 2nd Defendant to operate an Auctioneer.

6. The alleged issue of sale is an afterthought, illegal assertion and calculated to delay the plaintiff from accessing the said Motor Vehicle until the order of injunction granted herein lapses.

15. The application is supported by the plaintiff’s affidavit sworn on 16th March 2016 in which he states that the court delivered a ruling on 7th March 2016 in which it granted an order for injunction and further directed the defendants to release the suit motor vehicle to him. He states that he served the said order of 7th March 2016 on the defendants who have however declined to release the suit motor vehicle to him in outright disobedience of a lawful court order. He also contends that he on 17th November 2015 obtained an order before the lower court in Kisii CMCC Misc. Appl. No. 114 to restrain the 2nd defendant from selling the suit motor vehicle which order he served on the 2nd defendant and he has attached to his affidavit as annexure “JMG3” together with the proof of service.

16. The defendants filed a statement of grounds of opposition to the 2nd application in which they listed the following grounds:

1. The instant Notice of Motion Application, is, pre-mature, misconceived, incompetent and otherwise legally untenable, insofar as the limb of the Orders that anchors the Application herein, is the subject of Review Application dated 14th March 2016.

2. The instant Application is contrary to and prohibited by the provisions of Section 5 of the Judicature Act, Chapter 8 Law of Kenya

3. On the other hand, the instant Application does not disclose any reasonable cause of action, whatsoever and/or howsoever.

4. In any event, the plaintiff/Applicant herein is Non-suited.

5. The instant Application constitutes and/or amounts to an abuse of the due process of court.

6. In the premises, the Notice of Motion Application herein is Devoid of merits, whatsoever and/or howsoever.

17. On 2nd March 2016 the 2nd defendant swore a replying affidavit to the 2nd application in which he stated that he received instructions from the 1st defendant to levy distress on the plaintiff's movable property in order to recover rent arrears amounting to Kshs. 6,801,151 and that pursuant to the said instructions, he filed Kisii CMCC Misc. Application No. 114 of 2015 wherein the court granted him the green light to proceed with the levying of distress after which he seized the suit vehicle on 29th October 2015. He further states that the court orders of 30th October 2015 did not bar or prohibit the advertisement and sale of the suit motor vehicle and that upon seizing the suit motor vehicle he promptly advertised it for sale and subsequently sold it on 18th November 2015.

18. The 2nd defendant reiterates that he directed his advocates to lodge the application dated 14th March 2016 upon realizing that the order for release of the suit motor vehicle could not be enforced owing to the sale.

19. The 2nd defendant denies that he disobeyed a lawful court order which is a pre-requisite for contempt of court proceedings. The defendants accuse the plaintiff of failure to disclose material facts pertaining to the sale of the suit motor vehicle.

20. As I have already stated in this ruling, parties agreed to canvass their arguments on the twin applications dated 14th and 16th March 2016 by way of written submissions.

Plaintiff's submissions

21. Through his advocates M/s Ombachi & Co. Advocates, the plaintiff isolated the issues for determination in the application dated 14th March 2016 as follows:

A. Whether there exist new important matter or evidence which after the exercise of due diligence, was not within the Applicant's knowledge or could not be produced by him at the time when the order was made.

B. Whether the court having made a finding on the manner in which the Applicants conducted themselves in attaching the plaintiff's motor vehicle can sit on appeal of her own ruling.

C. Whether the Applicants are acting in bad faith, with the object of obstructing the cause of justice and treating the orders of court with contempt.

22. The plaintiff submitted that having been served with the pleadings and court orders for temporary

injunction dated 30th October 2015 the defendants action of attaching the suit motor vehicle was legally not correct and that this court had in its ruling made on 7th March 2016 already expressed itself on the procedure adopted by the defendants in seizing the suit motor vehicle. The plaintiff therefore submitted that the application for review is in fact a decoy for an appeal and hence allowing the application will be tantamount to this court sitting on appeal in its own ruling. The plaintiff's case was that there was no new evidence or important matter exhibited by the defendants to warrant an order for review.

23. The plaintiff contends that the trend that has been adopted by the defendants since the inception of the case is that of obstructing the course of justice exhibited by pure acts of disobedience of the court's orders.

24. Turning to the application dated 16th March 2016, the plaintiff submitted that the orders in Kisii CMCC Misc. Application 114 of 2015 stopping the intended sale of the suit motor vehicle were duly served on the defendants and therefore, this court has powers to punish the defendants for disobedience of the said orders in order to assert its authority and safeguard the dignity of the court.

25. The plaintiff argues that the statement of the grounds of opposition and replying affidavit of the 2nd defendant are an afterthought and a vain justification of a process that the court had already declared to be contrary to the law, mischievous and an attempt to steal the match from the opponent.

26. The plaintiff reiterated that the application dated 16th March 2016 was well grounded properly before the court. The plaintiff relied on the following authorities:

a) High court of Kenya at Nairobi, Environment and Land Division, Husein Alibhai Pirbhai Zoher Husein Pirbhai Vs Notthwood Development Company Limited Housing, Finance Company Of Kenya Limited.

b) High Court of Kenya at Bungoma, Awadh Vs Marumbu, Miscellaneous Application No. 53 of 2004 Kenya Law Reports (2004) IKLR

c) The Civil Procedure (Amendment) No. 2) Rules 2012

d) Shah Vs Dharamchi, High Court at Mombasa Civil Suit No. 370 of 1978.

e) Kizingo Distributors (1984) Lrd Vs Kibbette & Britten Kenya Ltd Kenya Breweries Ltd High Court at Mombasa case No. 166 of 2006

Defendants submissions

27. M/s Oguttu Mboya & Co. Advocates for the defendants highlighted the issues for determination in the application dated 14th March 2016 as follows:

a) Whether the orders of the court granted on the 30th day of October 2015 restrained the sale of the suit Omnibus.

b) Whether the sale of the suit Omnibus breached and/or violated the orders of 30th October 2015.

c) Whether the suit Omnibus was sold on the 18th November 2015.

d) Whether the sale of the suit Omnibus was/is a material issue relevant to the subject Dispute.

e) Whether the sale of the suit Omnibus, which was not within the knowledge of the

Honorable Court at the time of delivery of the Ruling, is a new and important discovery to warrant review.

f) Whether there is sufficient cause and/or basis to warrant Review.

28. On the first issue, the defendants submitted that the court's order of 30th October 2015 did not bar and/or restrain the advertisement and/or sale of the suit motor vehicle that had been attached on 29th October 2015 since the attachment took place before the issuance of the said orders.

29. It is the defendants' case that by dint of the provisions of Rule 12 (e) and (f) of the Auctioneers Rules, 1997, it was at liberty to proceed with the sale of the suit motor vehicle, as it did and therefore the entire process of sale was lawful. The defendants relied on the decision in **Dr. Joel Muthrui vs Julius Gichuru Guantai, CA No. 72 of 1996 (unreported)** in support of this argument.

30. The defendants submitted that the issue regarding the sale of the suit motor vehicle was not brought to the attention of the court as at the time that the written submissions were filed and highlighted on 20th November 2015 since by then, the sale had not taken place and therefore, it was a new and important piece of evidence which was not placed before the court and warrants the granting of orders for review. The defendants therefore contend that the court orders of 7th March 2016, directing the release of the suit motor vehicle was not workable or achievable in view of the fact that purchaser of the suit motor vehicle is protected and/or sanctified by the provisions of Section 14 of the Sale of Goods Act Chapter 31 Laws of Kenya.

31. The defendants cited the case of **Kimita & Another vs Wakibiru (1986) KLR** in which it was held:

"The third ground, any other sufficient reason, under Order 44 Rule 1 (1) enabling a party to apply for Review is not necessarily confined to the kind of reasons stated in the two preceding heads, namely, error and discovery of new evidence neither do these heads form a genus or class of things which the third head could be analogous to."

"The civil Procedure Act, (Cap 21) Section 80 confers an unfettered right to apply for review and so the words, for any sufficient reason, need not be analogous with the other grounds specified in the order."

32. On the 2nd application, the defendants cited the issues for determination as follows:

a. Whether the Honorable Court is seized of Jurisdiction to grant the reliefs at the foot of the Application.

b. Whether the Orders of 7th March 2016 and more particularly, the limb pertaining to release of the suit Omnibus, is achievable.

c. Whether the defendants/Respondents are guilty of Disobedience of the Court Orders.

33. On the first issue, the defendant submitted that Order 40 Rule 3 of the Civil Procedure Rules only allows the court to deal with an application for disobedience of a term of injunction yet in the instant application, the limb of the order said to have been disobeyed does not pertain to an injunction.

34. The defendants argued that the applicable law for disobedience of the court's order ought to have been the Section 5 of the Judicature Act Cap 8 Laws of Kenya and therefore, this court lacks the jurisdiction to grant the orders sought. On this point, the defendants relied on the decision in the case of **Adero & Another vs Ulinzi Sacco Society Ltd (2002) I KLR** wherein the issue of jurisdiction in contempt of court cases was discussed.

35. On the plaintiff's prayer for cancellation of the 2nd defendant's Auctioneers license the defendants

submitted that the authority or original jurisdiction to cancel licenses is within the jurisdiction of the Auctioneers Licensing Board, pursuant to the provisions of the **Auctioneers Act 1996**.

36. On the 2nd issue, the defendants submitted that the sale of the suit motor vehicle was the subject of Kisii CMCC Misc. Application No. 114 of 2015 wherein the lower court on 25th February 2016 held that the suit motor vehicle had already been sold.

37. The defendants added that the court orders made on 7th March 2016 were made *per in curium* and therefore the enforcement of the same would be contrary to the law and as such the defendants were under the law allowed to seek the review/variation of illegal and absurd orders.

Analysis & determination

38. I have anxiously considered the two applications and the rival submissions of the counsel for both parties together with the authorities that they relied upon.

39. The issues which arise in the two applications can be summarized as follows:

a) On the first application (dated 14/3/2016) whether the plaintiff has made out a case to warrant the issuance of the orders for review sought.

b) On the 2nd application (dated 16/3/2016);

- **whether the plaintiff invoked the proper procedure in filing the application,**
- **whether the defendants were served with the court order or in the alternative, were aware of the same,**
- **whether the defendants are guilty of disobedience and/or breach of the said court order and if so, whether the plaintiff is entitled to the prayers sought in the said application including the prayer that the 2nd defendant's the auctioneers license of be revoked.**

Review

40. **Order 45 Rules 1, 2 and 4 of the Civil Procedure Rules** under which the applicant's application has been brought stipulates as follows:

“[Order 45, rule 1.] Application for review of decree or order.

1. (1) Any person considering himself aggrieved—

(a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or

(b) by a decree or order from which no appeal is hereby allowed,

and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.

(2) A party who is not appealing from a decree or order may apply for a review of judgment notwithstanding the pendency of an appeal by some other party except where the ground of such appeal is common to the applicant and the appellant, or when, being respondent, he can

present to the appellate court the case on which he applies for the review.

[Order 45, rule 2.] To whom applications for review may be made.

2. (1) An application for review of a decree or order of a court, upon some ground other than the discovery of such new and important matter or evidence as is referred to in rule 1, or the existence of a clerical or arithmetical mistake or error apparent on the face of the decree, shall be made only to the judge who passed the decree, or made the order sought to be reviewed.

(2) If the judge who passed the decree or made the order is no longer attached to the court, the application may be heard by any other judge who is attached to that court at the time the application comes for hearing.

[Order 45, rule 4.] Application where more than one judge hears.

4. (1) Where the application for a review is heard by more than one judge and the court is equally divided the application shall be dismissed.

(2) Where there is a majority, the decision shall be according to the opinion of the majority.”

41. Section 80 of the Civil Procedure Act stipulates as follows:

“80. Review

Any person who considers himself aggrieved—

(a) by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or

(b) by a decree or order from which no appeal is allowed by this Act, may apply for a review of judgment to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit.”

42. In the instant case, the defendants have at paragraphs 12, 13 and 14 of the affidavit in support of the application stated:

12. That be that as it may, it is worthy to note that the sale of the suit Omnibus took place after the parties herein had filed their respective Affidavits, which Affidavits were filed on or before the 17th day of November 2015. Consequently, the issue of the sale of the suit omnibus was not captured in the Replying Affidavit sworn on the 16th November 2015, by and/or at the instance of the 1st defendant/Applicant.

13. That owing to the foregoing, the sale and/or disposal of the suit Omnibus, was not brought to the attention of the Court during the submissions. In any event, I am credibly informed by or Advocates on record, which information I verily believe to be true, that being an issue of fact, same could not form the basis of submission.

14. That in view of the foregoing, the sale of the suit Omnibus is a new and important evidence which was not availed to the Honorable Court at the time of filing the respective Affidavits. Nevertheless, the sale is an important and paramount issue of evidence that ought to be taken into account and/or considered.

43. The question which arises from the above averments and which begs for an answer is whether failure to include a matter in a replying affidavit in time or at all *per se* qualifies the said issue to be a new and

important matter within the meaning of **Order 45 Rule 1 of the Civil Procedure**.

44. The provisions of **Order 45 Rules** are clear that the new and important matter or evidence must be that which ***“after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made.”***

45. In the instant case, the 2nd defendant was all along aware that it had already seized the plaintiff's motor vehicle and was prepared to sell it as at 17th November when it filed the replying affidavit. The defendants were also aware that the issue of the release of the suit motor vehicle was one of the issues pending the court's determination on 7th March 2016. It is my finding that the sale of the suit motor vehicle does not therefore constitute a new and important matter of evidence that was not within the knowledge of the defendant at the time the ruling was rendered.

46. I find that the defendants were still at liberty, anytime before the pronouncement of the ruling on 7th March 2016, to seek the leave of the court to file a further/supplementary affidavit so as to bring into perspective the issue of the alleged sale of the suit motor vehicle since order 45 Rule 1 does not prescribe a time limit for the availing of such evidence and allows the production of such new evidence at the time before the decree is passed or order made.

47. It is my finding that the defendants had ample time to furnish the court with the **“new evidence”** which opportunity they squandered and one can say that in this case, the alleged new evidence was not only within the knowledge of the defendants, but that the defendants did not also exercise due diligence as is prescribed by the provisions of **Order 45 Rule 1**.

48. I found useful guidance in the decision of **Kwach, Lakha and O'kubasu JJA** in the case of **Tokesi Mambili and others vs Simion Litsanga (CA 90 of 2001-Kisumu)** delivered on 28th March 2003 where they held as follows:-

“In order to obtain a review an applicant has to show to the satisfaction of the court that there has been discovery of new and important matter or evidence which was not within his knowledge or could not be produced at the time when the order to be reviewed was made. An applicant may have to show that there was a mistake or error apparent on the face of the record or for any other sufficient reason.(Emphasis added)”

49. In applying the principles espoused in the above case I find that there was no discovery of new and important matter or evidence which was not within the defendant's knowledge or could not be produced by them at the time the order was made.

50. Even assuming that the issue of the sale of the suit motor vehicle was a new and important piece of evidence as alleged, would this court grant the orders for review sought.

51. I am afraid that the answer to the above question would still be to the negative. This is because in its ruling made on 7th March 2016, which is the subject of the instant review application, this court had extensively pronounced itself on the procedure adopted by the 2nd defendant in seizing the suit motor vehicle at a time when the case revolving around the distress for rent was still ongoing. This court had in part, in the said ruling observed as follows:

“In respect to the 3rd application filed by the plaintiff seeking the unconditional release of motor vehicle registration number KBY 187A that was attached by the Defendants on 29th October 2015, I note that the said attachment was done one day after the Defendants were served with the 1st application that was slated for inter partes hearing the following day on 30th October 2015. I agree with the Plaintiff's contention that the said attachment, done under the guise of levying distress for rent, was conducted in bad faith and was intended to pre-empt the outcome of this case, to steal the match from plaintiff and circumvent the due process of this court. Even though the interim orders of injunction had by then not been granted, the Defendants were upon been

served with the court documents, expected to be patient and exhibit respect to the law and the already initiated court process by holding their horses on any intended adverse action, pending the outcome of the court case.”

52. Having pronounced itself on the legality/propriety of the seizure of the suit motor vehicle as expressed hereinabove, my view is that the granting of orders of review over the suit motor vehicle as is sought by the defendants would be akin to this court sitting on appeal in its own judgment. It is also worthy to note that this court had, in the impugned ruling of 7th March 2016, also dealt, at length, with the propriety of the 2nd defendant instituting parallel proceedings before the lower court immediately he was served with the pleadings in this case whereupon this court found;

“The defendants do not deny that they were duly served with the initial pleadings and order of this court directing that the 1st application be heard on 30th October 2015. Instead of waiting for the hearing of the 1st application, the Defendants mischievously and in outright disregard to the rule of res subjudice stated in Section 6 of the Civil Procedure Act, rushed to jump the gun by filing a miscellaneous application and obtaining quick orders from the lower court in a move clearly calculated to defeat the case pending before this court and steal the match from the plaintiff. I note that it would not have costed the Defendants anything to await the due process of the law to run its course. This conduct by the Defendants does not augur well for the proper and fair administration of justice and it is for this reason that I allow part of prayer 3 only of the application dated 4th November 2015. The costs of the 3rd application shall abide the outcome of the main suit.”

53. In view of the court's previous findings on the entire procedure adopted by the defendants in seizing the suit motor vehicle, I still find that reviewing the impugned orders will be tantamount to this court sitting on appeal in its own earlier decision. In sum, I find that the defendant's application dated 14th March 2016 for review lacks merit and I therefore dismiss it with costs to the plaintiff.

Application dated 16th March 2016

54. The 2nd application sought, *inter alia*, the cancellation of the 2nd defendant's license and a finding that the defendants are guilty of contempt of court. The application was premised on the ground that the defendants had not complied with the order made on 7th March 2016 for the unconditional release of the suit motor vehicle despite having been duly served with a copy of the said order together with a penal notice.

Cancellation of the 2nd defendant's auctioneers license.

55. On cancellation of the 2nd defendant's license, I agree with the submissions of the counsel for the defendants that this is a claim that falls within the preserve/mandate of the Auctioneers Licensing Board.

56. I find that disobedience of a court order *per se* does not automatically give rise to the cancellation of the said auctioneer's license as under the Auctioneers Act, the Auctioneers Licensing Board is mandated to hear the complaint and take appropriate disciplinary measures should it deem it necessary. The ***Auctioneers Act***, at its preamble expressly states that it is:

“An Act of Parliament to consolidate and amend the law relating to auctioneers, to provide for the licensing and regulation of the business and practice of auctioneers, and for connected purposes.”

57. The ***Auctioneers Act*** is primarily concerned with the manner in which the auctioneers conduct their business and this includes licensing, regulation of business and practice of auctioneers. In view of the above observations, I find that this court lacks jurisdiction, in the first instance, to deal with cancellation of the auctioneers license since this is the preserve of the Auctioneers Licensing Board which a quasi judicial body charged with the function of undertaking disciplinary proceedings against errant

auctioneers.

58. My view is reinforced by the existence of two distinct provisions of the *Auctioneers Act* being sections 24 and 26 which provide as follows:

24. (1) A complaint against a licensed auctioneer of misconduct, which expression includes disgraceful or dishonorable conduct incompatible with the status of an auctioneer, may be made to the Board by any aggrieved person within a period of one year after the occurrence of the event giving rise to the complaint.

(2) Where a person makes a complaint under this section, the complaint shall be by affidavit by himself setting out the allegations of misconduct which appear to arise on the complaint, and shall be forwarded to the Board together with the prescribed fee.

(3) The Board shall give the licensed auctioneer against whom the complaint is made an opportunity to file an affidavit in reply to the allegations and to appear before it, and shall furnish him with a copy of the complaint, and of any evidence in support thereof, and shall give him an opportunity of inspecting any relevant document not less than seven days before the date fixed for the hearing:

Provided that where in the opinion of the Board the complaint does not disclose any prima facie case of misconduct, the Board may at any stage of the proceedings, dismiss the complaint without requiring the licensed auctioneer to whom the complaint relates to answer any allegation made against him and without hearing the complaint.

(4) After hearing the complaint and the licensed auctioneer to whom the complaint relates, if he wishes to be heard, and considering the evidence adduced, the Board may order that the complaint be dismissed or if it is of the opinion that a case of misconduct on the part of the auctioneer has been made out, the Board may order

(a) that the licensed auctioneer be admonished; or

(b) that the auctioneer's licence be suspended for such period, not exceeding six months as the Board thinks fit; or

(c) that the auctioneer's licence be revoked; or

(d) that such condition or conditions as it deems appropriate be attached to the auctioneer's licence; or

(e) that the licensed auctioneer pay a fine not exceeding one hundred thousand shillings; or

(f) that the licensed auctioneer pay compensation not exceeding one hundred thousand shillings to the person damaged by his misconduct; or

(g) that the auctioneer be disqualified from holding an auctioneer's licence for such period as the Board thinks fit; or

(h) such combination of the above orders as the Board thinks fit.

(5) The Board may make such order as to the payment by any party of any costs or witness' expenses and as to the expenses of the Board or the members thereof in connection with the hearing of any complaint as it may think fit.

(6) Any order of the Board may be filed with a subordinate court and shall, upon service of the notice of filing thereof upon the licensed auctioneer, be enforceable in the same manner as an

order of the subordinate court to the like effect.

59. As is clear from the above provisions of the Auctioneers Act, there are several disciplinary measures and penalties that can be imposed upon an auctioneer found guilty of any misconduct apart from the cancellation of license. It therefore my finding that the plaintiff ought to lodge his complaint, if any, against the 2nd defendant to the Auctioneers Board for determination.

Contempt of court.

60. The defendants did not deny that they were aware of or were duly served with a copy of the said order. The issue of service or awareness of the said order does not therefore arise. The defendants however argued that the impugned order that was allegedly disobeyed did not fall under the provisions of order 40 rule 3 of the Civil Procedure Rules since it was made under the provisions of section 3A of the Civil Procedure Act and therefore, the only recourse available to the plaintiff was to file a motion for contempt under Section 5 of the Judicature Act Cap 8 Laws of Kenya. The defendants argued that this court lacks jurisdiction to entertain and/or adjudicate upon the orders sought in the 2nd application.

61. On the applicable law, there are two procedures for the institution of contempt of court proceedings, under Order 40 of the Civil Procedure Rules and Section 5 of the Judicature Act, (Chapter 8 Laws of Kenya) which is the substantive law on contempt of court that confers this court with the power to punish for contempt of court. The said section provides that:

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 such 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”.

62. The applicable procedural law is **order 40 Rule 3(1) of the Civil Procedure Rules** which enacts that:-

Order 40, Rule 3

Consequence of breach

3. (1) In cases of disobedience, or of breach of any such terms, the court granting an injunction may order the property of the person guilty of such disobedience or breach to be attached, and may also order such person to be detained in prison for a term not exceeding six months unless in the meantime the court directs his release.

(2).No attachment under this rule shall remain in force for more than one year, at the end of which time, if the disobedience or breach continues, the property attached may be sold, and out of the proceeds the court may award such compensation as it thinks fit, and shall pay the balance, if any, to the party entitled thereto.

(3) An application under this rule shall be made by notice of motion in the same suit.

63. The Court of Appeal had this to say on the issue in the case of **Shimmers Plaza Ltd V National Bank Of Kenya Ltd (2015) eKLR.**

“This provision (Section 5) of the Judicature Act subjects the proceedings for contempt of court in Kenya to the current law governing the High Court of justice in England. The law governing the justices in England previously who subject to common law and order 52 of the Supreme Court Rules. However England enacted the contempt of Court Act of the 1981 which

supplements its common law contempt of court offences. The prevailing law of contempt in England now found in the contempt of Court Act of 1981 and part 81 of the procedure in the Civil Procedure (amendment No. 2) rules 2012..

This court has interpreted and applied the said law locally in many important decisions. In the recent Wambora case (supra) the court had opportunity to interpret and apply Section 5 of the Judicature Act and made the follow observations.

*“It is imperative in considering this issue to take into account the applicable law and the governing principles in contempt proceedings. As correctly pointed out by this court in **CHRISTINE WANGARA GATHIGA VS ELIZABETH WANJIRU EVANS & 11 OTHERS CIVIL APPLICATION NO. 233 OF 2007** the statutory basis of contempt of court so far as the Court of Appeal and the High Court are concerned is Section 5 of the Judicature Act and section 63 (c) of the Civil Procedure Act of relevance to this case is section 5 of the Judicature act which provides 5 (1). The High Court and the Court of Appeal shall have powers to punish for contempt of court as is for the time being possessed by the High Court of justice of England.”*

64. From the above decision it is clear that the strict procedures outlined by the defendants has now since changed as an application can now be made under **rule 81 (4) of the Supreme Court Rules** which deals with breach of judgment order or undertaking made in the proceedings in which the judgment was made or the undertaking given. In such an application, the applicant is required to set out clearly the ground on which the committal application is made, identify separately and numerically each alleged act of contempt and be supported by affidavit(s) containing all the evidence relied upon.

65. In view of the express provision of **Article 159 of the Constitution of Kenya 2010** which now lays emphasis on substantive justice as opposed to procedural technicalities I find and hold that the applicants application is properly before the court.

66. In determining whether or not the defendants were in contempt of the court order of 7th March 2016, one needs to look no further than to ask if the said orders have been complied with by the party against whom they had been issued. It is not in dispute that the defendants have not complied with the orders of 7th March 2016 and this is what prompted the filing of the 2nd application.

67. The defendants stated that they did not comply with the said order because the suit motor vehicle had already been sold to a third party by the time the order for its release was made on 7th March 2016. The defendants reason brings me back to the same vexing question that arose in the 1st application which is, whether the defendants, more specifically, the 2nd defendant, was justified in selling the suit motor vehicle in the first place in the face of the pending proceedings and the temporary order of injunction that was issued on 30th October 2015 including the pending application that sought the release of the said motor vehicle to the plaintiff.

68. As I had already observed in the ruling rendered on 7th March 2016, the seizure of the suit motor vehicle by the 2nd defendant the moment he became aware of the filing of the instant case was clearly meant to steal the match from the plaintiff and obstruct the due process of the court in rendering a decision in the whole case by pre-empting the courts verdict.

69. The defendants argued that the orders of temporary injunction issued by this court on 30th October 2015 did not restrain the advertisement and sale of the suit motor vehicle. The said order was worded as follows:

“Pending the inter-partes hearing there be an order of temporary injunction issued against the Respondent by themselves, their servants, agents or any person acting under their instructions restraining them from trespassing, entering into the demised premises and taking away the proclaimed goods of the Applicant, evicting or in any manner interfering with the Applicant’s tenancy”

70. It is worthy to note that the said order was not made in isolation or out of the blue, but in the context of a suit and an application which the plaintiff had filed to complain about an impending distress for rent that the defendants had initiated against him. Consequently, the order of 30th October 2015 was to restrain the defendants from interfering in any manner whatsoever with the plaintiff's tenancy pending the inter-partes hearing of the application.

71. It is my finding that proceeding to sell the suit vehicle in the face of orders restraining any interference with the plaintiff's tenancy pending inter-partes hearing was in itself contemptuous not only of the said court order, but also the ongoing proceedings that were still pending before the court. To my mind, an order restraining the interference with the plaintiff's tenancy covered any action of distress for rent pending the outcome of the application.

72. The claim by the defendants that the third party purchaser of the suit motor vehicle is vested with legal rights attendant to the sale under section 14 of the Sale of Goods Act Cap. 31 Laws of Kenya does not therefore hold any water as the said sale, as I have already found in this ruling, was carried out in total disregard and contempt of the express orders of the court.

73. Black's Law Dictionary (Ninth Edition) defines contempt of court as:

“Conduct that defies the authority or dignity of a court. Because such conduct interferes with the administration of justice, it is punishable usually by fine or imprisonment.”

74. In the Scottish case of **Stewart Robertson Vs Her Majesty's Advocate, 2007 HCAC63, Lord Justice Clerk** stated that:

“ contempt of court is constituted by conduct that denotes wilful defiance of or disrespect towards the court or that wilfully challenges or affronts the authority of the court or the supremacy of the law, whether in civil or criminal proceedings”

75. The learned Judge further stated that:

“The power of the court to punish for contempt is inherent in a system of administration of justice and that power is held by every judge.”

76. In the case of **Board Of Governors Moi High School Kabarak Vs Malcolm Bell & Another, (Supreme Court Petition Nos 6&7 Of 2013,** the Supreme Court of Kenya described the power to punish for contempt as a power of the court ***“to safeguard itself against contemptuous or disruptive intrusion from elsewhere”*** and identified that power as one of the indisputable attributes of the court's inherent power. ***“Without that power, protection of citizens' rights and freedoms would be virtually impossible. Courts of law would be reduced to futile institutions spewing forth orders in vain.”***

77. In **Heelmore Vs Smith,(2)1886)L.R. 35 C.D455, Lord Bowen, LJ** aptly stated the rationale for punishing for contempt as:-

“The object of the discipline enforced by the court in case of contempt of court is not to vindicate the dignity of the court or the person of the Judge, but to prevent undue interference with administration of justice.”

78. Lord President Clyde's dictum in **Johnson Vs Grant 1923 Sc 789** at page 790 however cautioned that:

“The law does not exist to protect the personal dignity of the judiciary nor the private rights of parties or litigants. It is not the dignity of the court which is offended. It is the fundamental supremacy of the law which is being challenged.”

79. From the above decisions it is clear that courts will punish for contempt of court in order to safeguard

the rule of law which is the foundation of the administration of justice without which the justice system would be reduced to theatre of the absurd thereby opening a clear avenue to chaos and anarchy. A party who obtains an order from the court expects that the said order will be obeyed and therefore, blatant disobedience of a court order does not augur well for the proper administration of justice.

80. In the case of **Kenya Tea Growers Association Vs Francis Atwoli and 5 Others [2012] eKLR** Lenaola J cited with approval the case of **Clarke and Others Vs Chadburn & Others [1985] 1All E.R (PC), 211** in which the court observed that:

“I need not cite authority for the proposition that it is of high importance that orders of the courts should be obeyed, wilful disobedience to an order of the court is punishable as a contempt of court, and I feel no doubt that such disobedience may properly be described as being illegal....even if the Defendants thought that the injunction was improperly obtained or too wide in its terms, that provides no excuse for disobeying it. The remedy is to vary or discharge it.”

81. The conduct of the defendants in this case, when considered in totality, aptly fit within the definition of what constitutes contempt of court as it is clear that from the very beginning of the case, the 2nd defendant set in motion a sequence of activities immediately he was served with the pleadings, that were intended to set the stage for disobedience of any orders that would eventually be made in this case with the sole aim of obstructing the plaintiff's access to justice.

82. The defendants had the option of appealing against the temporary orders of injunction or applying to vary or discharge them. They however did not take this route but instead they opted to institute parallel proceedings before the lower court in a move clearly intended to preempt and prejudice the outcome of this case. The impugned order of 7th March 2016 was plain, simple and clear as it directed the 2nd defendant to unconditionally release the suit motor vehicle to the plaintiff. The 2nd defendant did not comply with the said order under the lame excuse that he had already sold the suit motor vehicle. I find that the 2nd defendant is guilty of contempt of court and he cannot seek to sanitize his actions by selectively reading and interpreting the orders of 7th March 2016.

83. As stated by **Romer L.J In Hadkinson Vs Hadkinson(1952) All ER 567:**

“It is the plain and unqualified obligation of every person, against, or in respect of, whom an order is made by a 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 even void”

“For, a party who knows of an order, whether null or valid, regular or irregular cannot be permitted to disobey it. It would be most dangerous to hold that the suitors or their solicitors could themselves judge whether an order was null or valid. Whether it was regular or irregular, that they should come to the court and not take upon themselves to determine such question. That the course of a party knowing of an order which was null and irregular, and who might be affected by it, was plain, he should apply to court that it might be discharged. As long as it exists, it should not be disobeyed.” Per Lord Cottenham L.C in Chuck Vs Cremer(1) 1 COOP TEMP COTT 342).

84. Courts must send a strong message to those who are intent in disobeying its orders that such conduct will not be tolerated. The 2nd defendant is a licensed auctioneer and by extension, in the position of an officer of the court who is expected to be aware of the dire consequences of disobeying a court order.

85. As was held by the Court of Appeal in **Central Bank of Kenya & Another vs. Ratilal Automobiles Limited & Others Civil Application No. Nai. 247 of 2006**, judicial power in Kenya vests in the Courts and other tribunals established under the Constitution and that it is a fundamental tenet of the rule of law that court orders must be obeyed and it is not open to any person or persons to choose whether or not to comply with or to ignore such orders as directed to him or them by a Court of law.

86. Having found that, the 2nd defendant disobeyed the courts' orders issued on 7th March 2016, and in order to ensure that the rule of law, the authority and the dignity of our Courts are upheld at all times, I hereby make orders as follows;

a) That the Officer Commanding Kisii Police Station (OCS) do search, arrest, and detain motor vehicle registration number KBY 187A Isuzu Bus pending further orders of this court.

b) That the 2nd defendant herein, do personally appear before this Court to explain why appropriate sanctions should not to be taken against them in light of his disobedience of lawful court orders.

c) The costs of this application shall abide the outcome of the main suit.

d) Mention on 8th February 2017

Dated, signed and delivered in open court this 7TH day of December, 2016

HON. W. A OKWANY

JUDGE

In the presence of:

Ombachi for the plaintiff

Oguttu for the Defendants

Okongo for the interested party/Objector

Omwoyo: court clerk