



**REPUBLIC OF KENYA**

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

**Civil Appeal 216 of 2009**

**CHARLES OMBUI OMBWORI ..... APPELLANT**

**AND**

**EQUITY BANK LIMITED ..... 1<sup>ST</sup> RESPONDENT**

**KENNEDY MOKUA ..... 2<sup>ND</sup> RESPONDENT**

**(Being an appeal from the ruling of Hon. P.L. Shinyada, RM, dated and delivered  
on 30<sup>th</sup> September, 2009 in the original Kisii CMCC NO. 256 of 2009)**

**JUDGMENT**

1. The appellant was the plaintiff in Kisii CMCC No.256 of 2009. He filed plaint on 15<sup>th</sup> April 2009 seeking the following reliefs:-

a) *A declaration that the 1<sup>st</sup> defendant's enforcement of its powers of seizure of the plaintiff's m/v under the loans agreement and the seizure of the plaintiff's m/v Reg. Nos.KAX 701 W and KAX 593 K by the 2<sup>nd</sup> defendant is illegal, unlawful and null and void.*

b) *A mandatory injunction directing the return of m/v Reg. Nos. KAZ 701W and KAX 593 K to the plaintiff and general damages for their illegal seizure.*

c) *Costs of the suit.*

d) *Interest at court rates.*

2. Contemporaneously with the plaint, the appellant filed a chamber summons dated 5<sup>th</sup> April 2009 seeking the following orders:-

1. *That this application be certified urgent and be heard ex parte in the first instance.*

2. *That pending the hearing of this application inter partes a temporary mandatory injunction do issue directing the defendants to release the plaintiff's motor vehicle Reg. Nos. KAX 593 K and KAX 701 W.*

3. *That pending the hearing of this application inter partes the 2<sup>nd</sup> defendant/respondent be*

*restrained from putting up for sale M/V Reg. Nos. KAX 593 K and KAX 701 W.*

4. *That pending the hearing and determination of this suit the defendants be restrained from seizing the plaintiff/applicant's m/v Reg. No. KAX 593 K and KAX 701 W.*

5. *That the costs of this application be provided for.*

3. The application was supported by the grounds on the face and the affidavit sworn by the appellant on 15<sup>th</sup> April 2009. The appellant's contention was that the 1<sup>st</sup> appellant herein had breached the loan agreement by seizing the appellant's aforesaid motor vehicles. The appellant also contended that the 1<sup>st</sup> respondent's seizure of the appellant's m/v as aforesaid would in effect render the loan repayments difficult for the appellant since the money for the loan repayments was earned from the motor vehicles that had been seized.

4. That application was resolved through a consent recorded in court on 13<sup>th</sup> May 2009 in the following terms:-

1. *That M/V Reg. No. KAX 701 W and No. KAX 593 K be and are hereby released to the plaintiff forthwith.*

2. *That the arrears of Kshs.35000/= under the loan contract be paid by the*

*plaintiff to the 1<sup>st</sup> defendant within 14 days from the date hereof.*

3. *That the plaintiff to continue the payment of the agreed monthly instalments of Kshs.92,000/= under the loan agreement until payment in full.*

4. *That costs of Kshs.10,000/= be paid to each of the defendants herein within 30 days from the date hereof.*

5. *The 2<sup>nd</sup> defendant (the auctioneer) to file his bill for assessment and determination as to who is entitled to pay them.*

6. *In default of the orders in paragraphs 2, 3 and 4 foregoing execution to issue.*

5. Apparently, the 2<sup>nd</sup> respondent failed to release M/v Reg. Nos. KAX 701W and KAX 593 K to the appellant as per the consent order above stated. As a result of that default, the appellant filed a notice of motion dated 20<sup>th</sup> May 2009 pursuant to **Order XXXIX rule 2 A** of the **CPR** and **Sections 3, 3A and 63 (e)** of the **CPA** seeking to punish the 2<sup>nd</sup> respondent herein for disobeying the orders of court dated 15<sup>th</sup> May 2009 and requiring the said 2<sup>nd</sup> respondent to purge the disobedience of the court's orders dated 15<sup>th</sup> May 2009 by releasing the aforesaid motor vehicle Reg. Nos. KAX 701W and KAX 593 K to the appellant herein.

6. The appellant averred in his affidavit in support of the Notice of Motion for contempt that despite having been duly served with the consent order, together with the penal notice appearing thereon, the 2<sup>nd</sup> appellant refused to release the above stated motor vehicles to the appellant. The appellant contended that the honourable court had been treated with contempt and put to indignation by the 2<sup>nd</sup> respondent's actions. The appellant sought to have the 2<sup>nd</sup> appellant punished appropriately.

7. The application for contempt was heard by the court below during which it was argued on behalf of the 2<sup>nd</sup> appellant that only the High Court had jurisdiction to punish for contempt as provided under **section 5** of the **Judicature Act, Cap 8 Laws of Kenya** which reads:-

**“5 (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.**

**(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.”**

8. Upon hearing the application, the trial magistrate reached the conclusion that though the 2<sup>nd</sup> appellant was clearly in contempt of a court order, the trial court did not have the jurisdiction to punish for contempt. The trial court also concluded that the appellant’s failure to seek and obtain leave of the High Court before commencing the contempt proceedings was fatal to the application. The application was accordingly dismissed with costs.

9. The appellant was aggrieved by the said ruling. He filed this appeal on the following grounds:-

1) *The trial magistrate erred in law and fact in her decision that leave was necessary before commencing the application seeking to have the 2<sup>nd</sup> respondent punished for disobeying a court order even when the orders that were disobeyed were issued under order XXXIX Rules 1 and 2 of the Civil Procedure Rules.*

2) *The ruling of the trial magistrate was wrong and unreasoned in so far as the application before her was brought pursuant to Order XXXIX Rule 2A of the Civil Procedure Rules.*

3) *The trial magistrate erred in law and fact in dismissing the application dated 26<sup>th</sup> May 2009 which was otherwise competent and meritorious.*

10. Reasons wherefore the appellant prays that the trial court’s orders dated 30<sup>th</sup> September 2009 be set aside and in place thereof, the application dated 26<sup>th</sup> May 2009 be allowed with costs and this court do mete out an appropriate punishment against the 2<sup>nd</sup> respondent herein.

11. By consent of the parties at time of taking directions, this appeal was canvassed by way of written submissions. The parties agreed to file and exchange their respective submissions within twenty (20) days from 16<sup>th</sup> February 2011. To date, only the submissions of the appellant are on record. The court has carefully read the submissions. The court has also carefully read the pleadings and the proceedings in the lower court.

12. This is a first appeal and as required of it, this court is under a duty to reconsider and evaluate the whole of the evidence afresh with a view to reaching its own conclusions in the matter, and to interfere only if it is apparent that the trial court failed to take into account particular circumstances or based his impression on demeanour of witnesses which was inconsistent with the evidence. See **Maimuna s/o Patrick Mutoo –vs- Wilson Njau Nyaki – Civil Appeal No.131 of 1994**. The Court of Appeal for Eastern Africa also held in the case of **Peters –vs- Sunday Post Ltd. [1958] EA 424**, that in exercising the jurisdiction to review the evidence to determine whether the conclusions of the trial court should stand, an appellate court should exercise this jurisdiction with caution; if there is no evidence to support a particular conclusion, or if it is shown that the trial court has failed to appreciate the weight or bearing of the circumstances admitted or proved, or has plainly gone wrong, the appellate court will not hesitate to so decide.” Also see **Watt –vs- Thomas [1974] 1 All ER 582; Pandya –vs- R.[1957] EA 336**.

13. In the instant case, the only issue that arises for determination is whether the trial court had the jurisdiction to deal with the application for contempt. At the hearing of the application in the lower court, counsel for the appellant argued that the trial court had the jurisdiction. Counsel repeated the same argument at the hearing of this appeal.

He contended in his submissions that any court has the jurisdiction to deal with an application seeking to

punish a person who disobeys orders issued under **Order XXXIX Rules 1 and 2** by dint of **rule 2A (2)** thereof, and that the provisions of the **Judicature Act** apply to orders other than those issued under **Order XXXIX** of the [old] CPR. Counsel did not provide any authority to support his arguments.

14. In the persuasive authority in the case of **Andalo & another –vs- James Gleen Russel Ltd – Nairobi HCCC No.590 of 1988**, the court held, and quite rightly in my view, that though there are no procedural rules laid out in our law regarding applications seeking to commit a defendant to civil jail for failing to obey a court order earlier issued against such a defendant, the English substantive law governs the matter and also that the English procedural rules apply as well. The court held that such a procedural rule is to be found in **Order 52 rule 2** of the **Supreme Court of England** which requires that an application for an order of committal shall not be made unless leave has been granted. This was also the stand taken by the Court in the case of **Awadh –vs- Marumbu [2004] 1 KLR 454**. In the **Awadh case**, the court was guided by the Court of Appeal decision in the case of **Mwangi HC Wangonde –vs- Nairobi City Commission – CA No.95 of 1988** where it was held that:-

**“In view of the clear provisions of section 5 (1) of the Judicature Act, we have to turn to the Practice and Procedure in England in order to discover how the power to punish for contempt of court is exercised.”**

15. In this jurisdiction, the power to punish for contempt of court is entirely in the hands of the High Court and the Court of Appeal. In the circumstances, I am satisfied that the trial magistrate was right in finding and holding that the said court did not have the jurisdiction to grant the orders sought by the appellant in his application dated 26<sup>th</sup> May 2009. Secondly, the application was incompetent for having been filed without leave of the court.

16. Consequently, the appeal herein lacks merit and the same is dismissed with no order as to costs.

17. Lastly, the delay in delivering this ruling/judgment is very much regretted. At the time it was due, I was engaged in hearing and determining the more than 125 boundary dispute cases against the Independent Electoral and Boundaries Commission. Judgment in the said cases was delivered by the 5-Judge Bench on 9<sup>th</sup> July 2012.

18. It is so ordered.

**Dated and delivered at Kisii this 7<sup>th</sup> day of September, 2012**

**RUTH NEKOYE SITATI**

**JUDGE.**

**In the presence of:**

Mr. Ogweno for Minda (present) for Appellant

Mr. Mose (absent) for 1<sup>st</sup> Respondent

Mr. Ntabo (absent) for 2<sup>nd</sup> Respondent

Mr. Bibu - Court Clerk

**RUTH NEKOYE SITATI**

**JUDGE.**