



**Wahome v Lupra Manpower & Human Resource Services Limited & another
(Cause 924 of 2017) [2024] KEELRC 1852 (KLR) (16 July 2024) (Ruling)**

Neutral citation: [2024] KEELRC 1852 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 924 OF 2017
JK GAKERI, J
JULY 16, 2024**

BETWEEN

HENRY WACHIRA WAHOME CLAIMANT

AND

**LUPRA MANPOWER & HUMAN RESOURCE SERVICES
LIMITED 1ST RESPONDENT**

BASCO PRODUCTS (K) LIMITED 2ND RESPONDENT

RULING

1. Before the court for determination is the 2nd Respondent's Notice of Motion dated 27th March, 2024 filed under Certificate of Urgency seeking orders that:-
 1. Spent.
 2. Spent.
 3. The Auctioneer herein Jeremiah Kiarie Muchendu t/a Icon Auctioneers be committed to Civil jail for such period as would be deemed necessary or be fined by this court for being in contempt of court by blatantly and with impunity disobeying and breaching the stay of execution orders issued by this court on 25th day of March, 2024.
 4. The Claimant either by himself or through his advocate, Agent, Auctioneer or any other person acting on behalf of the Claimant in execution of the Decree herein be ordered to bear all the costs of the attachment of the 2nd Respondent's motor vehicle registration mark KCU 014C together with goods therein as well as compensate the 2nd Respondent for loss of use and other losses incurred by the 2nd Respondent following the impounding of the motor vehicles KCU 014C, and the goods therein.
 5. The Honourable Court do issue any further orders necessary in the interests of justice.



6. The costs of this Application be borne by the Auctioneer and/or the Claimant's Advocates on record.
2. The Notice of Motion is expressed under Order 40 Rule 3(i), Order 51 Rule 51 of the Civil Procedure Rules and Section 1, 3, 3A and 63(c) of the Civil Procedure Act, and is based on the grounds set forth on its fact and the Supporting Affidavit of Robert Owuor sworn on 27th March, 2024 who deposes that the court granted an order of temporary stay of execution on 25th March, 2024 and the same was issued on 26th March, 2024 and the same was brought to the attention of Mr. Jeremiah Kiarie Muchendu t/ a Icon Auctioneers prior to service of a physical copy of the order.
3. That prior to the issuance of the order, the affiant had contacted the Auctioneers and informed them to desist from the attachment as the order issued by the court was awaiting signature at the court, for service of a physical copy and attaches copies of call logs and sms message.
4. That despite knowledge of the order, the auctioneers proceeded with the execution of the Decree against the 2nd Respondent by attaching and impounding motor vehicle mark KCU 014C together with goods on 26th March, 2024.
5. That as soon as the order was availed, the advocate informed the auctioneer via email not to proceed with the intended attachment as it had been stayed but the attachment proceeded and the goods impounded were not subject of the proclamation and the same was irregular and Mr. Jeremiah Muchendu is in contempt of court as he disregarded the order given on 25th March, 2024 having been aware of its existence.
6. That the disregard of the order has brought the court and its processes to disrepute and the auctioneer should be committed to civil jail for 6 months or a fine as determined by the court.
7. That the auctioneer has issued a Notification of Sale in disregard to the order of stay of execution and continues to hold the 2nd Respondent's motor vehicle together with the goods at an unknown place hence the order for release.
8. That the impounding of the goods in the motor vehicle is unlawful as they were not part of the proclamation and the 2nd Respondent stands to suffer irreparably and it is necessary that the motor vehicle be released and the goods therein.
9. That the Claimant, his advocate, agent or auctioneer be held liable for the purported execution and consequences.
10. The affiant deposes that it is in the interest of justice that orders sought be granted.

Auctioneers response

11. In his Replying Affidavit sworn on 8th April, 2024, Mr. Jeremiah Kiarie Muchendu deposes that he duly served the warrants of attachment on the 2nd Respondent and the court order in question had not been served when the attachment took place at 09.15 hours and was only sent at 15.29 hours after the attachment had taken place rendering the court order ineffectual.
12. That he called the Claimant's counsel who confirmed that there was no court order and the mentioned extracts were not accompanied by a certificate of accuracy.
13. That the Notification of Sale was issued as no order had been served as it was served at 1600 hours after execution has taken place.



14. That the driver of the lorry had indicated that he would obtain another lorry to transfer the goods but did not.
15. The affiant states that he is not in contempt as the order of temporary stay was served long after execution and was executing his duties as commanded by the court.
16. That the motor vehicle was released after service of the order and goods belonged to the 2nd Respondent indirectly and proof of loss has not been demonstrated.
17. The affiant prays for dismissal of the application with costs.

Claimant's Response

18. Mr. Henry Wachira Wahome, the Claimant deposes that after the judgment on 30th November, 2024, his counsel on record engaged Icon Auctioneers who proclaimed the 2nd Respondent's movable assets on 18th March, 2024 and notice expired on 25th March, 2024 and motor vehicle Registration No. KCU 014C was attached on 26th March, 2024 at 9.15 hours.
19. That the applicant served the auctioneer with the order of stay on 26th March, 2024 at 15.29 pm on WhatsApp after the vehicle had been impounded and the Advocate was unaware of the application or any order until 16.17 hours on 26th March, 2024 when it was sent on email and neither the Claimant nor his advocate was aware of the Order before 26th March, 2024 and the Advocate only sight the email on the morning of 27th March, 2024 and his contacts were readily available on the pleadings or the Law Society of Kenya website but no attempt was made to reach out to his advocate on the orders granted on 25th March, 2024.
20. That the Orders dated 26th and 27th March, 2024 contain Penal Notice.
21. The affiant deposes that the auctioneer was acting within the law as he was executing a valid warrant issued by the court and neither the auctioneer nor the advocate disobeyed any court order and the physical application and order were served on 2nd April, 2024 and the order is signed on 26th March, 2024 as well as 27th March, 2024 and a plausible reason is that the Order was signed on 27th March, 2024.
22. That the applicant has not proved that the Orders dated 26th March, 2024 and 27th March, 2024 were served on the auctioneer or the Claimant as the alleged communication on record is between unknown persons as there are no telephone contacts attached.
23. That neither the auctioneer nor the affiant's advocate would have known of the existence of the Order issued on 27th March, 2024 until service was effected.
24. The affiant prays for dismissal of the application with costs.
25. In his Supplementary Affidavit sworn on 16th April, 2024, Mr. Robert Owuor deposes that the Order granted by the court on 25th March, 2024 was extracted on 26th March, 2024 and its existence was brought to the auctioneer's attention before the physical copy was served.
26. That the phone number used 0721XXX933 saved as "George" was provided by the auctioneer as per the Proclamation.
27. That before attachment of the motor vehicle, the affiant had informed the auctioneer that there was a court order awaiting signature and responded that the same had been overtaken by events.



28. That the auctioneer had prior knowledge of the order but disregarded the same by attaching the motor vehicle and when the order was collected, the auctioneer was notified not to proceed with the attachment.

Applicant's submissions

29. As to whether the auctioneer is in contempt of the orders made on 25th March, 2024, counsel submits that he is as one Robert Owuor notified the auctioneer by telephone that the Order of stay of execution of Decree had been granted but he proceeded to attach on 26th March, 2024 while aware of the temporary order of stay and the motor vehicle was not released unconditionally and continues to be in contempt of both orders.
30. Reliance is made on the sentiments of the court in *Canadian Metal Co. Ltd V Canadian Broadcasting Corporation (No. 2)* (1975) 48 DLR 30, *Kenya Human Rights Commission V Attorney General & another* (2018) eKLR, *Nthabiseng Phoko V Ekurheleni Metropolitan Municipality & another* CCT 19/11 (75/2015), *Carey V Laiken* (2015) SCC17 and Hon. *Martin Nyaga Wambora & another V Justus Kariuki Mate & another* (2014) eKLR among others on the duty of obeying court orders by all and sundry, to argue that the auctioneer should be held in contempt as he was aware of the Orders.
31. On costs for the wrongful attachment, counsel submits that the auctioneer was liable to pay the storage charges as he remained adamant even after service of the second order on 28th March, 2024 for the release of the motor vehicle and merely wrote a letter for the release of the motor vehicle and did not pay storage charges and is thus liable to pay the charges.

Auctioneer's submissions

32. Mr. Jeremiah Kiarie Muchendu submits that he had attachment warrants issued by the court and the order of stay was not served by the time he proceeded to attach at 09.15 hours and the order was sent at 15.29 hours after the attachment and had already been overtaken by events.
33. Prove of service is indicated on the Notification of Sale.
34. Mr. Muchendu submits that prove of service is by prove of the time of service and the existence of the Order had not been brought to his attention.
35. Finally, the auctioneer urges that the vehicle had been released to the 2nd Respondent and the application is an afterthought intended to delay the cause of justice and ought to be dismissed.

Claimant's submissions

36. As to whether the attachment was regular, counsel submits that it was and cites the sentiments of the court in *Engineer E.M. Kithimba t/a Kithimba Associates Consulting Eng. V Attorney General & another* (2016) eKLR to reinforce the submission.
37. As to whether the auctioneer is in contempt, counsel urges that the guiding principles of contempt are knowledge of the Order and of its terms and failure to comply, wilfulness and bad faith may be inferred on the part of the Respondent.
38. Counsel submits that the auctioneer had deponed that he was not served with the terms of the Order until after execution had taken place.
39. Counsel maintained there must be wilful and deliberate disobedience of court orders and the auctioneer released the motor vehicle after the court order was served.



40. That the applicant has not proved service on the alleged contemnor prior to the service of the physical copy of the order.
41. Counsel urges that although the applicant alleges that it communicated with the auctioneer and informed him of the orders, the auctioneer was not privy to the suit and could not log-in to the e-filing platform to confirm the information.
42. Similarly, the applicant did not call or write to the Claimant's counsel who would have confirmed with the e-filing system and the argument that the auctioneer was aware of the terms of the order cannot stand.
43. On costs, counsel urges that since the auctioneer was executing a regular warrant and the proclamation was properly served, costs should follow the event.

Analysis

44. The singular issue for determination is whether the 2nd Respondent's Notice of Motion dated 27th March, 2024 is merited.
45. It is common ground that the instant application was precipitated by the earlier one dated 21st March, 2024 whose interim relief was an Order of temporary stay of execution of the judgment and Decree of 30th November, 2013.
46. The principal relief in the earlier application is the review, variation or setting aside of the impugned judgment.
47. The 2nd Respondent avers and submits that the auctioneer, Mr. Jeremiah Kiarie Muchendu is in contempt of the order of stay of execution granted on 25th March, 2024 and should be committed to civil jail or fined for the contempt.
48. The gravamen of the applicant's case is that the auctioneer blatantly ignored a court order he was aware of.
49. Section 5 of the *Judicature Act* confers jurisdiction on the superior courts to punish contempt of court as follows.
50. 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 of England and that power shall extend to upholding the authority and dignity of subordinate courts.
51. The necessity to punish for contempt is encapsulated in legions of decisions.
52. In *Republic V Ahmad Abolfathi Mohamed & another* (2018) eKLR, the Supreme Court observed as follows;

“Authorities on the necessity to punish contempt are legion. We have considered those provided by the Respondent and also cite the following in affirmation of the principle”.
53. In *Econet Wireless Kenya Ltd V Ministry for Information & Communication of Kenya & another* (2005) 1 KLR 828, Ibrahim J. (as he then was) relied on the Court of Appeal decision in *Gulabchand*



Popatlal & another Civil App No. 39 of 1990 (unreported) where the Court of Appeal stated as follows;

“It is essential for the maintenance of the rule of law and order that the authority and dignity of our country 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 contemnor . . . In *Hadkinson V Hadkinson* 2 ALLER 567 it was held that; 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 void”.

54. See also *Josephine Mueni Mutunga V Energy Regulatory Commission & another* (2016) eKLR, *Praxes Namoni Sisi V Geothamal Development Company Ltd & another* (2016) eKLR, *Mwaniki Silas Ngare V John Akama & another* (2016) eKLR, *TSC V KNUT & 2 others* (2013) eKLR among others.

55. In *Republic V Mohammed & another* (2019) KESC 47 (KLR), the Supreme Court stated as follows;

“There is no doubt that an act in contempt of court constitutes an affront to judicial authority and the court has the liberty and empowerment to mete out penalty for such conduct in a proper case. The object is firstly, to vindicate the court’s authority, secondly, to uphold honourable conduct among advocates, in their standing as officers of the court; and thirdly to safeguard its processes for ensuring compliance, so as to sustain the rule of law and the administration of justice”.

56. As regards the standard of proof, the sentiments of Ojwang J. (as he then was) in *B V Attorney General* (2004) 1 KLR 431 are instructive as follows;

“ . . . It is, therefore, evident that not only do contemnors demean the integrity and authority of courts, but they also deride the rule of law. This must not be allowed to happen. We are also conscious of the standard of proof in contempt matters. The standard of proof in cases of contempt of court is well established. In the case of *Mutitika V Babarini Farm Ltd* (1985) KLR 229 234, the Court of Appeal held that;

“In our view, the standard of proof in contempt proceedings must be higher than proof on a balance of probabilities, almost but not exactly, beyond reasonable doubt. The standard of proof beyond reasonable doubt ought to be left where it belongs, to wit in criminal cases. It is not safe to extend it to an offence which can be said to be quasi-criminal in nature”.

“The rationale for this standard is that if cited for contempt and the prayer sought is for committal to jail, the liberty of the contemnor will be affected. As such, the standard of proof is higher than the standard in civil cases. This power, to commit a person to jail must be exercised with utmost care and exercised only as last resort. It is of utmost importance therefore for the Respondents to establish that the alleged contemnor’s conduct was deliberate, in the sense that he or she wilfully acted in a manner that flouted the court order”.

57. The principles that govern contempt proceedings are well settled.



58. In *Samuel M. N. Mweru & others V National Land Commission and 2 others* (2020) eKLR, the court stated as follows;

“It is an established principle of law that in order to succeed in civil contempt proceedings, the applicant has to prove (i) the terms of the orders, (ii) knowledge of these terms by the respondent, (iii) failure by the respondent to comply with the terms of the order. Upon proof of these requirements, the presence of wilfulness and bad faith on the part of the respondent would normally be inferred, but the respondent could rebut this inference by contrary proof on a balance of probabilities. Perhaps, the most comprehensive of the elements of civil contempt was stated by the learned authors of the Book *Contempt in Modern Newzealand* who succinctly stated:-

There are essentially four elements that must be proved to make the case for civil contempt. The applicant must prove to the required standard (in civil contempt cases which is higher than civil cases) that:-

- a. the terms of the order (or injunction or undertaking) were clear and unambiguous and were binding on the defendant;
- b. the defendant had knowledge of or proper notice of the terms of the Order;
- c. the defendant has acted in breach of the terms of the Order; and
- d. the defendant’s conduct was deliberate”.

59. In the instant case, the 2nd Respondent argues that the auctioneer ignored and breached a court order it was aware of.

60. Mr. Robert Owuor deponed that as early 19th March, 2024, he had notified the auctioneer that it would move to court and the stay order though granted on 25th March, 2024 was eventually issued on 26th March, 2024.

61. Uncertified phone records reveal that at 09.44 am, a message alluding to the existence of stay orders was sent to an undisclosed number to one George who Mr. Robert Owuor does not appear to know, but the telephone number 0721 224933 had been provided by the auctioneer in its Proclamation of Attachment dated 18th March, 2024.

62. The message stated as follows;

“Hi George, kindly note that we have obtained stay order for your notice to us. Kindly don’t attach our property”.

63. The order was forwarded to telephone number 0721224933 at 15.29 pm.

64. A response from the number stated as follows;

“Yes it’s a stay but overtaken by event”.

65. A copy was forwarded to email address iconauction@gmail.com on 26th March, 2024 at 16.03 pm and a hard copy on 2nd April, 2024.

66. In his Replying Affidavit, Mr. Jeremiah Kiarie Muchendu deposed that attachment took place at 9.15 am and no court order had been served at that time.



67. Equally, the phone message to Mr. George was sent at 9.44 am after the attachment.
68. Even assuming that message was received by the auctioneer at 9.44 am, the attachment had already taken place.
69. Similarly, the message did not set out the terms of the order and service was necessary.
70. From the evidence on record, it is discernible that terms of the order were communicated to the auctioneer at 15.29 pm long after the attachment.
71. It is unclear to the court why the applicant's counsel did not engage the Claimant's counsel who could have confirmed whether indeed an order of stay had been granted. In any case, the Claimant's counsel engaged the auctioneer and would have been the appropriate person to contact as regards the ex parte order.
72. Although knowledge of the existence of a court order may supercede personal service and in particular where a party's conduct reveals that it had knowledge of the court order as held in *Basil Criticos V Attorney General & 8 others* (2012) eKLR in this case, the applicant tendered no evidence to show that the auctioneer had knowledge of the terms of the court order by the time he proceeded to attach the motor vehicle.
73. Since the order was granted ex parte, it behooved the applicant to communicate its import to the Claimant's counsel and the auctioneer either on 25th March, 2024 prior to commencement of business on 26th March, 2024.
74. More significantly, since the auctioneer was not a party to the suit, personal service was essential and service was effected after the event.
75. Finally, the applicant has not tendered verifiable evidence to prove that the auctioneer's conduct was deliberate.
76. Flowing from the foregoing, it is discernible that the applicant has failed to demonstrate that the auctioneer is in contempt of any court order as the applicant had not communicated the terms of the court order prior to the attachment of the motor vehicle.
77. Having found and held as above, it follows that neither the Claimant, his advocate, agent nor the auctioneer is liable to pay the costs of the attachment or loss of use of the Respondent's motor vehicle Registration Mark KCU 014C as it was not in violation of any court order.
78. Finally, since the motor vehicle and the goods were released to the applicant pursuant to the court order granted on 28th March, 2024, none of the parties is liable.
79. In the upshot, the 2nd Respondent's Notice of Motion dated 27th March, 2024 is unmerited and it is accordingly dismissed with no order as to costs.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 16TH DAY OF JULY 2024

DR. JACOB GAKERI

JUDGE

ORDER

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions



of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159(2)(d) of *the Constitution* which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of *the Constitution* and the provisions of Section 1B of the *Civil Procedure Act* (Chapter 21 of the Laws of Kenya) which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

DR. JACOB GAKERI

JUDGE

