

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MACHAKOS
CIVIL APPLICATION NO. E144 OF 2023

BETWEEN

**ZARN ENTERPRISES SYSTEMS
COMPANY**

LIMITED.....DEFENDANT/APPLICANT

AND

**JACKLINE MWENDE MUTIO & MARY MUTIO (ESTATE OF
FRANCIS KYALO NGANDA(DECEASED)).....**

PLAINTIFF/1st RESPONDENT

MILAN AUCTIONEERS.....2ND

RESPONDENT

*(Being contempt proceedings for Court Orders issued on 17th
December, 2024 at Machakos High Court (Hon. Mr. Justice F. O.
Rayola)*

RULING

1. Before this court for determination is a Notice of Motion Application dated 10th February 2025, supported by an affidavit of even date seeking the following orders:

1.....spent

2. THAT this Honourable Court do issue an Order for the committal to Civil Jail of the 1st and 2nd respondents herein and/or their agents, servants and/or whoever is acting under their

instructions for a period not exceeding six (6) months for disobeying and/or defying this Honourable Court Orders given on 17th December 2024.

3. THAT a warrant of arrest be and is hereby issued to the Officer Commanding Industrial Area Police Station to arrest the 1st and 2nd respondents and/or their agents and bring them before this Honourable Court for sentencing.

4. THAT in the alternative, this Honourable Court be pleased to order the 1st and 2nd respondents to accordingly pay a fine of Ksh. 500,0000/- or such amount as may be ordered as appropriate by this Honourable Court.

5. THAT a mandatory order be and is hereby issued against the 2nd respondent, their agents and/or third parties contracted by them, compelling them to release the motor vehicle KBR 164K Model Hyundai truck to the defendant/applicant unconditionally.

6. THAT this Honourable Court do hereby order that the defendant/applicant is not liable to pay any storage charges/fees as owed to the 2nd respondent and/or any third party contracted by the 2nd respondent herein as the same

transaction was void ab initio and thus no charges can accrue from the same.

7. THAT the plaintiff/1st respondent should not be heard until they purge themselves.

8. The Honourable Court be pleased to issue such other or further or consequential orders as may seem just and expedient.

9. The costs of and occasioned by the Contempt of Court proceedings herein be taxed and met by the 1st and 2nd respondent herein and in default thereof execution to issue forthwith.

2. This application is premised on the following grounds as set out in the application and the supporting affidavit sworn Paul Matete Wathitu;

i. Despite the 1st and 2nd respondents herein being served with the stay orders issued on 5th June, 2023 by the trial Magistrate HON. W.F ANDAYI, in Machakos CMCC NO. 301 of 2022, the 2nd respondent went ahead in full contempt of the Court and seized the defendant's/applicants motor vehicle KBR 164K and detained it without any rights to do so.

ii. In furtherance of this contempt, the plaintiff/ 1st respondent instructed the 2nd respondent to advertise and sell the Motor Vehicle KBR 164K on 18th November, 2023 despite there being Court

Orders issued on 2nd August, 2023 by Hon. Justice F. Rayola Olel on 25th July, 2023 staying any proceedings emanating from the Chief Magistrates Court.

- iii. Hon. Justice F. Rayola Olel on 17th December, 2024 issued Orders for the release of the motor vehicle KBR 164K from the 2nd respondent herein, an Order which has been ignored by the 2nd respondent and/or their agents, which has the effect of rendering the existing orders and entire proceedings herein of no consequence and a mere academic moot court.***
- iv. The 2nd respondent, his agents and/or third parties contracted by them cannot purport to gain any monetary value from an illegal enterprise orchestrated in defiance of Court orders issued.***
- v. The authority and dignity of this Honourable Court is under unmitigated erosion by the 2nd respondent herein, third parties contracted by them and/or their agents and unless this Honourable Court intervenes in the manner sought vide this instant application, then the sanctity of Court proceedings would be invited into disrepute as well as rewarding the plaintiff/1st respondent, 2nd respondents and their agents in making a mockery of the administration of justice.***

- vi. As a consequence of the 2nd respondent's disregard of and disobedience to the Court Orders aforesaid, and the blatant contempt with which the 2nd respondent treated the same, the authority and dignity of this Honourable Court has been gravely undermined and will continue to be so undermined unless the Court punishes the 2nd respondent accordingly and enforces its Orders as sought herein.**
- vii. The conduct of the 2nd respondent, his agents and/or third parties contracted by them in disobeying this Honourable Court's Orders aforesaid and treating the same with open contempt is unconstitutional and against the law.**
- viii. The defendant/applicant has no other means of enforcing this Honourable Court's Orders aforesaid, which bound the plaintiff/ 1st respondent, 2nd respondent, his agents and/or third parties contracted by them to the suit herein, except having recourse to this Honourable Court.**
- ix. It is therefore necessary, just and fair, and in order to redeem the integrity of this Honourable Court, restore the rule of law as far as these proceedings are concerned and foster public confidence in the administration of justice by the**

Honourable Court that the 1st interested party upon being found to be in contempt of the Court to be committed for such contempt and be punished accordingly.

x. There is jurisdiction to hear this application and grant the orders sought.

Respondent's replying affidavit dated 22nd May 2025.

3. In response, the 2nd respondent filed a replying affidavit sworn by Jackline Mwendu Mutio opposing the application. She depones that judgment against the applicant was delivered on 15th March 2023 and the applicant was duly notified of the same but chose to ignore the notice of entry of judgment. Consequently, through her advocates on record, she initiated execution proceedings against the applicant.
4. It is further deponed that the order dated 5th June 2023 was granted *ex parte* in the first instance and the applicant was granted interim orders until 7th June 2023. She states that when the application was fixed for *inter partes* hearing, the applicant was directed to serve both the application and the court order beforehand. However, the applicant failed to do so and instead attended court on the said date, misrepresented to the honourable court that service had been effected and fraudulently procured an extension of the interim orders *ex parte*. She adds that by the time the said

application was filed, the applicant's motor vehicle had already been proclaimed by the auctioneers.

5. She further deponed that on 20th July 2023 when the matter was scheduled for mention to confirm filing of submissions, her advocate on record was granted 14 days leave to file submissions on account of indisposition and the interim orders were not extended. Based on this, she instructed the auctioneers through her advocate to re-issue the warrants and proceed with execution. The warrants were re-issued on 19th November 2023 leading to the attachment of the applicant's motor vehicle.
6. She depones, that the execution was carried out pursuant to valid court orders and therefore cannot be deemed as illegal as alleged by the applicant. Accordingly, she asserts that the the applicant should bear the auctioneers' costs.
7. She further swears that while it is true that this Honourable court issued an order staying proceedings in Machakos CMCC NO. 301 of 2022, the said order only stayed proceedings in the lower court pending the hearing and determination of the application dated 30th June 2023. It did not stay execution as purported by the applicant.
8. It is deponed that the order issued by this Honourable court on 17th December 2024 did not direct the release of the suit motor vehicle as alleged. The said order emanated from an application dated 14th November 2023 filed by the applicant, seeking stay of execution, an injunction against selling,

charging and/ or disposing of the motor vehicle and a declaration that the attachment by the auctioneers was null and void.

9. In addition, it is deponed that the applicant has failed to establish any grounds warranting the orders sought. She therefore prays that the application be dismissed with costs and that the applicant be ordered to cater for the auctioneers fees and storage charges accrued to date.
10. The Court directed that the application be canvassed by way of written submissions. The applicant duly filed written submissions dated 24th June 2025 in support its application. The respondents, however, failed to file written submissions.

Applicant's Submissions

11. The applicant submits that contempt of Court constitutes the willful disobedience of a Court Order. In support of this position, the applicant invokes this Court's powers under Order 40 rule (3) of the Civil Procedure Rules (2010) and relies on the decision in **Dr. Fred Matiang'i v. Miguna Miguna & 4 Others [2018] eKLR**.
12. The applicant contends that there are subsisting court orders in this case. The first order was issued by the the Chief Magistrates Court at Machakos, Hon. Andayi W.F on 5th June, 2023, which was duly served on the auctioneer.

13. The second court order arose following the auctioneer's actions in advertising the the applicant's motor vehicle KBR 164K for sale in the newspaper despite existing orders staying proceedings in the Lower Court file. This Order was issued by Hon. Justice F. Rayola Olel on 30th June, 2023 upon the applicant's application, staying all proceedings before trial Magistrate Hon. C.N Ondieki in Machakos CMCC No. 301 of 2022 pending the hearing and determination of the said application.

14. The third Court Order was issued on the 17th December, 2024 by Hon. Justice F. Rayola Olel declaring the auctioneer's actions null and void and granting a temporary restraining order against the plaintiff/respondent and/or their agents.

15. It is the applicants asserts that all these court orders have been blatantly disobeyed or violated.

16. It is argued that the contemnor, Milan Auctioneer, was fully aware of the Court Order staying the execution of the default judgement. Nevertheless, despite being duly served, the auctioneer proceeded to attach and cart away the applicant's property in clear disregard of an order issued by a Court of competent jurisdiction. In this regard, reliance was placed on the decisions in **Director General of Fair Trading vs. Smith Concrete: Re Supply of Ready Mixed Concrete, [1992] QB 212** and **Republic v Cabinet Secretary for Trade and Industrialization & another;**

Kenya Farmers Associated Limited & 9 others Ex Parte Tom Lihru Wanambisi [2020] eKLR.

17. The applicant therefore invites this Court to cite the respondents for contempt of Court Orders and to adopt the measures previously implement in **Republic v Cabinet Secretary for Trade and Industrialization & another; Kenya Farmers Associated Limited & 9 others Ex Parte Tom Lihru Wanambisi [2020] eKLR.**

18. Finally, it is submitted that since the attachment was carried out in contravention of valid Court orders, then the ensuing charges are null and void and similarly are a nullity. It is urged that the applicant's motor vehicle KBR 164K, should be released back to the applicant unconditionally.

Analysis and Determination

19. Having carefully considered the pleadings and submissions before me, I find that the following issues arise for determination; first, whether the respondents are in contempt of the orders granted on 17th December 2024 and if so, whether they should be punished? Second whether this court can grant an unconditional release for the motor vehicle ***KBR 164K Model Hyundai truck.***

20. The Supreme Court in **Githiga & 5 others v Kiru Tea Factory Company Ltd [2023] KESC 41 (KLR)** reaffirmed that courts possess inherent power to enforce compliance with their lawful orders through contempt proceedings.

Although the Contempt of Court Act was declared unconstitutional in *Kenya Human Rights Commission v Attorney General & Another [2018] eKLR*, the operative provision remains section 5(1) of the Judicature Act, which grants the High Court and Court of Appeal the same powers to punish for contempt as the High Court of Justice in England. This jurisdiction extends to safeguarding the authority and dignity of subordinate courts.

21. Equally important is the standard of proof required in contempt matters. In **Republic v Mohammed & another [2018] KESC 51 (KLR)**, the Supreme Court emphasized that contempt proceedings demand a standard of proof higher than the civil threshold of balance of probabilities, though not as strict as beyond reasonable doubt. This principle was earlier articulated in **Mutitika v Baharini Farm Limited [1985] KLR 229**, where the Court of Appeal held that because contempt proceedings may result in committal to jail, thereby affecting personal liberty, the evidence must demonstrate deliberate and wilful disobedience of the court order. The power to commit must therefore be exercised cautiously and only as a last resort.

22. It is not in dispute that on 17th December 2024 Hon. Justice F. Rayola Olel issued the following orders:

“1. a temporary injunction be and is hereby issued restraining the Respondents, their servants and/or agent from selling, charging or disposing off and/or

otherwise interfering with any property belonging to the Defendant/Applicant pending the hearing and determination of Civil Appeal No. E144 of 2023 and CMCC No.301 of 2022.

2. The attachment and sale of motor vehicle registration number KBR 164K model Hyundai Truck by the Plaintiff/Respondent be and is hereby declared as null and void.

3. Costs of this application will be in the cause.”

23. The respondents were aware of these orders, as evidenced by their replying affidavit. They specifically acknowledged the injunction but disputed the applicant's claim that the court directed the release of the suit motor vehicle.

24. The applicant contends that Justice Olel ordered the release of the vehicle KBR 164K, and that the respondents ignored this directive. However, upon close examination of the orders, it is clear that no such release order was issued. The orders only declared the attachment and sale null and void and restrained further interference with the applicant's property. There is no evidence of a directive requiring the respondents to release the vehicle.

25. Moreover, the applicant has not demonstrated that the respondents acted in defiance of the injunction. No evidence has been presented to show that the respondents sold, charged, disposed of, or otherwise interfered with the

applicant's property after the issuance of the order. On the contrary, the public auction notice relied upon by the applicant was issued on 18th November 2023, well before the orders of 17th December 2024 were granted.

26. In light of the above, I find that the applicant has failed to establish deliberate and willful disobedience of the court order. The threshold of proof required in contempt proceedings has not been met.

27. As to whether the court can grant an unconditional release of the motor vehicle KBR 164K, Hyundai truck. In its ruling dated 17th December 2024, the court had already established that the primary suit was stayed and that the order of stay of execution remained in force. This procedural posture is critical because it means that the execution process, including attachment of the vehicle, cannot proceed until the substantive dispute is resolved.

28. The applicant has sought relief in the form of unconditional release of the vehicle, coupled with a declaration that it bears no liability for storage charges or auctioneer's fees claimed by the 2nd respondent. Conversely, the respondent maintains that the vehicle, having been under attachment, has continued to attract storage charges which remain unpaid and continue to accrue. This creates a direct conflict between the applicant's

position, that it should not be burdened with costs arising from an execution process stayed by the court, and the respondent's assertion that such costs are valid and enforceable.

29. The court, however, recognizes that the validity of the auctioneer's costs is a substantive issue that requires determination in the appropriate forum. This ruling is not the proper avenue to conclusively resolve that question. What is clear, nonetheless, is that there is no legal or equitable basis for continued detention of the motor vehicle, especially given the subsistence of the stay of execution. To hold the vehicle indefinitely would amount to an unjustified deprivation of property and would undermine the very purpose of the stay order.

30. Balancing the interests of both parties, the court directs that the auctioneer pursue his claim for costs through the proper legal mechanisms available to him. At the same time, to safeguard the respondent's interests pending resolution of the costs dispute, the applicant is ordered to deposit security of auctioneer's cost of Kshs. 150,000/- in court. This measure ensures that, should the auctioneer's claim ultimately be upheld, there will be funds available to satisfy the liability.

31. Accordingly, the court orders that

- a. the applicant has failed to establish deliberate and willful disobedience of the court order
- b. the motor vehicle KBR 164K, Hyundai truck be released to the applicant upon deposit in court an amount of kshs 150,000/- being security for auctioneer's costs
- c. that the auctioneer to pursue his claim for costs through the proper legal mechanisms available to him
- d. each party to bear its own costs.

It is so ordered.

Dated, signed and delivered at Machakos this 14th day of January, 2026.

RHODA RUTTO
JUDGE

In the presence of;

.....for Appellant

.....for Respondent

Selina Court Assistant