

**IN THE COURT OF
APPEAL AT KISUMU**

(CORAM: ASIKE-MAKHANDIA, OMONDI & KIMARU, JJ.A.)

CIVIL APPEAL (APPLICATION) NO. E103 OF

2021 BETWEEN

MAHAVIR TRANSPORTERS

CONTRACTORS LIMITED.....APPLICANT

AND

RAMBART MIHESO IFEDHA.....1STRESPONDENT

ROSEMARY BRENDA MUTENDE.....2ND RESPONDENT

THE LAND REGISTRAR KAKAMEGA.....3RD RESPONDENT

*(Being an application from the Judgment of the Environment and
Land Court of Kenya at Kakamega (Matheka, J.) dated 6th May*

2020

in

Case No. 207 of 2015)

**RULING OF THE
COURT**

1. The applicant moved this Court by notice of motion made under **section 5(1)** of the **Judicature Act** seeking three orders; that pending the hearing and determination of the application, an order of inhibition do issue inhibiting any further dealings with land parcel **No Kakamega/Municipality/Block VI/9** (*the suit property*); that leave do issue to cite contemnors for contempt of court order; that upon leave being granted, the contemnors be committed to Civil Jail for a period not exceeding six (6) months or they be sentenced to pay a fine as determined by the Court. The grounds in support of the

application are on the face of the
application. The applicant states that this Court did on 19th

March, 2021 issue temporary orders staying the execution of the Judgment in **Kakamega ELC No. 20 of 2015**. The 1st respondent in collusion with the 3rd respondent had caused to be transferred the suit property from the applicant to the 1st respondent contrary to the said order of the Court. The 1st respondent had gone further and constructed permanent structures on the suit property despite the existence of the Court order. The applicant was apprehensive that if the 1st respondent is not punished, he may transfer the suit property to third parties thus rendering the intended appeal nugatory. The applicant states that the 1st respondent was aware of the import of the Court order as the said Court order was issued in the presence of his advocate. The application is supported by the annexed affidavit of **Kanji Derji Chabahadaia**, a director of the applicant.

2. The application is opposed. The 1st respondent swore a replying affidavit in opposition to the application. He deponed that the application was *res judicata* as it was an attempt to re-litigate an application under **Rule 5(2)** of the **Court of Appeal Rules** which had already been considered by this Court and a Ruling thereto rendered. The 1st respondent denied that he was in contempt of the order of the Court as in his view, the applicant

failed to

establish the terms of the order, his knowledge of the said terms of the order and proof that he failed to comply with the said terms of the order. The 1st respondent deponed that the applicant did not establish, to the required standard of proof, that he was in contempt of the orders of the Court. The 1st respondent urged the Court to disallow the application with costs.

3. Prior to plenary hearing of the appeal, both the applicant and the respondent filed written submissions in support of their respective opposing positions. The 1st respondent filed a list and digest of authorities that he relied on in opposition to the application. During plenary hearing of the application, this Court heard brief oral highlights by **Ms. Akinyi**, learned counsel holding brief for **Mr. Odeny** for the applicant and **JB Macharia** learned counsel for the 1st respondent.
4. We have carefully considered the application, the affidavits filed thereto and the submissions made. The issue for determination is whether the applicant established a case for this Court to cite the 1st respondent for contempt of Court. Both the applicant and the 1st respondent appreciated the law regarding circumstances under which the contempt jurisdiction of this Court may be invoked.

5. This Court in **Geoffrey Kathusi Kison & 10 others v. East Africa Portland Cement Co. Ltd & 5 others [2021] KECA**

1043 (KLR) held thus:

“It is trite that to commit a person for contempt of Court, firstly, the Court must be satisfied that the person has deliberately and willfully disobeyed a Court order that he was aware of. Secondly, the order of the Court that is alleged to have been disobeyed must be clear and precise so as to leave no doubt as to what a party was supposed to do or refrain from doing. (See AB & another v. R.B. [2016] eKLR). Lastly, the standard of proof in committal proceedings is higher than proof on a balance of probabilities but not as high as proof beyond reasonable doubt.”

6. In the present application, the applicant argued that the 1st respondent was in breach of the order of this Court, firstly, by transferring the suit property from the applicant’s name to its name despite the said Order of the Court, and secondly, in putting up permanent structures on the suit property in contempt of the said orders of the Court. The 1st respondent denied the applicant’s assertion that he is in contempt of the order of this Court or was made aware of the order in question.
7. What is the order that the applicant alleges was breached by the 1st respondent? The order issued by this Court is dated 23rd March, 2021. In the material part, it states as follows:

“(i)The applicant has satisfied the twin requirement of Rules 5(2)(b) of the Court Rules.

(ii) The application is accordingly allowed with costs in the intended appeal.”

8. According to the applicant, this order was issued in the presence of the 1st respondent’s counsel and therefore, by implication, the 1st respondent became aware of it. On his part, the 1st respondent states that by the time the said order was issued, the suit property had already been transferred to him. In that regard, he cannot be held to be in contempt of disobeying an order in respect of an event that had already taken place. The 1st respondent also stated that the order as extracted was imprecise and vague and was not served upon him so that he can be said to be in contempt of the said Order.
9. We have considered the rival submission made by the parties to this application in that regard. It is clear to us that the application is not legally sustainable. Firstly, the order that the applicant complains the 1st respondent was in breach of is imprecise and lacks certitude to hold the 1st respondent legally accountable for its alleged breach. The order as extracted is vague and does not require the 1st respondent to do or refrain from doing anything. Secondly, even if the order was precisely extracted, the law requires that the 1st respondent to be

personally served with the

same. He was not. Thirdly, there is paucity of evidence placed before us to support the applicant's assertion that the 1st respondent breached the said order. The 1st respondent presented persuasive evidence which showed that the suit property had already been transferred to him by the time the said order was issued by the court. He had done nothing to alter the character of the suit property in the intervening period between the time the order was issued and the time the applicant filed the application. The applicant failed to establish the threshold as regards the required standard of proof to enable this Court invoke its punitive jurisdiction.

10. The application lacks merit and is hereby dismissed with costs to the 1st respondent.

Dated and delivered at Kisumu this 24th day of April, 2026.

ASIKE-MAKHANDIA

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**... JUDGE OF
APPEAL**

H.A. OMONDI

.....
**JUDGE OF APPEAL
L. KIMARU**

.....
JUDGE OF APPEAL

**I certify that this is
a true copy of
original.**

Signed

DEPUTY REGISTRAR.