



Kigio Group Company Limited v Kibaara & 8 others (Civil Appeal E193 of 2022) [2024] KECA 919 (KLR) (31 July 2024) (Ruling)

Neutral citation: [2024] KECA 919 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL E193 OF 2022
DK MUSINGA, MSA MAKHANDIA & P NYAMWEYA, JJA
JULY 31, 2024**

BETWEEN

KIGIO GROUP COMPANY LIMITED APPELLANT

AND

ROBERT KIBAARA 1ST RESPONDENT

HOUSING FINANCE COMPANY LIMITED 2ND RESPONDENT

J.M. GIKONYO T/A GARAM INVESTMENTS 3RD RESPONDENT

GEEPAK LIMITED 4TH RESPONDENT

ELIJAH ITEGI GITHINJI 5TH RESPONDENT

GRACE WAMUYU MATHENGE 6TH RESPONDENT

PARKSON PACKAGING E.A. LIMITED 7TH RESPONDENT

DEQMART COMMERCIAL AGENCIES LTD 8TH RESPONDENT

JOEL TEGERET 9TH RESPONDENT

(An application for Contempt of Court of orders issued by Musinga (P), Murgor & ole Kantai JJ. A on 25th May 2021 in Nairobi Civil Application No. E140 of 2021)

RULING

1. Kigio Group Company Limited, the Applicant herein, has sought an array of orders in its application dated 26th September 2023, which is brought pursuant to Section 3A and 3B of the [Appellate Jurisdiction Act](#), section 35 of the Court of Appeal (Organisation and Administration) Act as follows:

1. (spent)...



2. This Honourable Court be pleased to commit the 1st, 3rd, 5th, 6th and 9th Respondents and the principal officers and/ or directors of the 2nd, 4th, 7th and 8th Respondents to civil jail for a period of six (6) months or such other period as this Honourable Court may deem fit for disobedience of the order of this Honourable Court issued on 25th May 2021.
 3. This Honourable Court be pleased to impose upon the 1st, 2nd, 3rd, 4th, 5th, 6th, 7th, 8th and 9th Respondents such fine(s) and other penalties or sanctions as it may deem appropriate for disobedience of the orders of this Honourable Court issued on 25th May 2021.
 4. This Honourable Court be pleased to order and direct that all the proceedings in High Court Commercial Case No. E140 of 2023- Geepak Limited and 2 others v Housing Finance Company Limited be stayed and/or discontinued.
 5. This Honourable Court be pleased to order and/or direct that all the proceeds of rent collected from L.R. No 4953/IV/45 and 46 Thika Municipality Block 9/96 and 558- Thika Business Centre and deposited in the account of the 4th Respondent be restitution to the account of the Applicant being Account No. 0260000052-68 at Housing Finance Company Limited.
 6. This Honourable Court be pleased to issue an order that Account no 01051020004424 Sidian Bank Sameer Bank Branch be frozen as an account containing proceeds of crime specifically money obtained fraudulently from the Applicant and the proceeds be restituted.
 7. This Honourable Court be pleased to issue an order directing the Registrar of the High Court to lodge a complaint at the Directorate of Criminal Investigations with a view to prosecuting the Respondents for the offence of fraudulently dispossessing the Applicant of its property by colluding to file HCCOMM E140 of 2023.
 8. This Honourable Court be pleased to issue an order for urgent forensic audit by a Court appointed auditor of the Applicant's loan account with the 2nd Respondent to establish the extent of fraud and malfeasance committed by the 1st and 2nd Respondents and their agents against the Applicant since the execution of the charge against the subject suit property on 15th June 2015.
 9. This Honourable Court be pleased to issue an order pending the urgent forensic audit the proceeds of rent for LR No. 4953/IV/63 Kigio Plaza and LR No 4953/IV/45 and 46 Thika Municipality Block 9/96 and 5558 be released to the Applicant to pay for upkeep and medical bills of the shareholders of the Applicant.
 10. This Honourable Court be pleased to give an order directing the Officer Commanding Station (OCS) to supervise compliance with the Orders of the Court and particularly the removal of the Respondents' agents and encumbrances from the Applicant's properties known as LR No 4953/IV/63-Kigio Plaza and 4953/IV/45 and 46 Thika Municipality Block 9/96 and 556 also known as Thika Business Centre.
 11. The costs of this Application be provided for.
2. The facts giving rise to the application are set out in detail in the application, the supporting affidavit thereof sworn on 26th September 2023 by Stanley Njenga Ndegwa, a shareholder and chair of the Applicant; a replying affidavit sworn on 28th March 2024 by Regina Kajuju Anyika, the Company Secretary and Legal Director at the Housing Finance Company Limited, the 2nd Respondent herein; two replying affidavits sworn on 20th November 2023 and on 3rd May 2024 by Grace Wamuyu Mathenge, the 5th Respondent herein, who is also a director of Geepak Limited and Parkson Packaging



- Limited, the 4th and 7th Respondents herein; a replying affidavit sworn on 8th May 2024 by Elijah Itegi Githinji, the 5th Respondent herein and also Managing Director of the 7th Respondent, and a replying affidavit sworn on 2nd October 2023 by Joel Tegeret, the 9th Respondent herein and Managing Director of Deqmart Commercial Agencies Ltd, which is the 8th Respondent.
3. In summary, Applicant filed a suit against the 2nd and 3rd Respondents in the High Court at Kiambu being High Court Civil Suit No. 1 of 2020- Kigio Group Company Limited vs Housing Finance Company Limited & J.M. Gikonyo T/A Garam Investments, and also simultaneously filed an application for an order of a temporary injunction restraining the 2nd and 3rd Respondent from disposing of by way of Public auction or private treaty the Applicant's property known as Land Reference No. 4953/45 and 46/IV- Thika Municipality Block 9/9 and 558, also known as Thika Business Centre (hereinafter "the suit property"). The said application was heard and dismissed by the High Court (Kasango, J.) in a ruling delivered on 29th April 2021. The 3rd Respondent on instructions of the 2nd Respondent thereafter advertised the sale of the suit property by public auction scheduled for 25th May 2021. The Applicant thereupon filed an application dated 4th May 2021 in the Court of Appeal at Nairobi, being Civil Application No. 140 of 2021- Kigio Group Company Limited v Housing Finance Company Limited & J.M. Gikonyo T/A Garam Investment, and sought conservatory orders and an interim injunction against the 2nd and 3rd Respondents restraining them from selling by way of public auction or in any other manner disposing of the suit property pending the hearing of the intended appeal against the ruling of Kasango, J. delivered on 29th April 2021.
 4. On 25th May 2021, this Court, (Musinga (P), Murgor & Kantai, JJ.A.) considered the application and reserved it for ruling, and in addition stayed the sale of the suit property by public auction which was scheduled for 25th May 2021 pending the delivery of the ruling. In a ruling delivered by the Court of Appeal on 23rd July 2021, the Court allowed the application and restrained the 2nd and 3rd Respondents from disposing of or alienating the suit property. In the meantime, on or about 3rd April 2023, Geepak Limited, Parksons Packaging E.A Limited, and Deqmart Commercial Agencies Ltd, the 4th, 7th and 8th Respondents, jointly filed a suit in the High Court against the 2nd Respondent, being HCCOMM No. E140 of 2023 - Geepak Limited, Parksons Packaging East Africa Limited & Deqmart Commercial Agencies Limited vs HFC Limited, and simultaneously also filed an application seeking various interlocutory injunction orders. On 4th September 2023, Mong'are, J. delivered a ruling on the said application and gave a mandatory injunction order, directing that all the future rental income collected and/ or earned from the suit property be paid directly to the 4th Respondent's Bank Account domiciled at Sidian Bank, Sameer Branch. Additionally, the Court issued an order of mandatory injunction that the rental income collected and/ or earned by the 2nd Respondent from the suit property with effect from 25th May 2021 up to the date of the ruling be utilized to offset the loan arrears due and owing to the 2nd Respondent on the facilities extended by it to the 4th and 7th Respondents and secured by a charge over Land Reference No, 30036/2 (IR No. 190140) owned by the 8th Respondent.
 5. The 2nd Respondent was aggrieved by the said ruling and order of the High Court rendered on 4th September 2023, and filed an application before this Court for an injunction and stay of execution, being Civil Application No. E455 of 2023-HFC Limited vs Geepak Ltd & 2 Others. The Court directed the application be held in abeyance pending the hearing of this appeal. The 2nd Respondent subsequently filed a substantive appeal against the said ruling and order of the High Court, being Civil Appeal No. E66 of 2023-HFC Limited vs Geepak Ltd & 2 Others.
 6. Arising from these facts, the Applicant's case, is that it is the registered proprietor the suit property, and that on 25th May 2021, this Court gave an order of injunction stopping the 2nd and 3rd Respondents



from proceeding with the sale by public auction of the suit property. The Applicant contends that the 4th, 7th and 8th Respondents nevertheless colluded to lodge HCCOMM No. E140 of 2023 - Geepak Limited, Parksons Packaging E.A. Limited and Deqmart Commercial Agencies Ltd vs Housing Finance Company Limited in the High Court on 3rd April 2023 without informing the Applicant of the proceedings and while they knew and were aware of the order of this Court given on 25th May 2021, since the 4th Respondent had by consent been joined as an interested party to this appeal on 21st March 2023. In addition, that the orders of the High Court (Mong'are, J.) of 4th September 2023 in HCCOMM No. E140 of 2023 overruled the orders of this Court of 25th May 2021, and another order of the High Court given in HCCOMM No. E634 of 2021-Kigio Group Company Limited v Housing Finance Company Limited, J. M. Gikonyo T/A Garam Investments, Geepak Limited, Elijah Itegi Githinji and Grace Wamuyu Mathenge that the status quo with respect to the suit property be maintained pending the hearing and determination of the application before the Court. Further, that the order of the High Court of 4th September 2023 purported to issue final mandatory orders vesting the suit property and the rental income therefrom in the 4th Respondent without allowing the Applicant an opportunity to be heard.

7. The Applicant pleaded that the Respondents had chased away tenants from the suit property before the appeal herein is heard and determined, and were interfering with the suit property by demolishing the interior partitions and the floor of the building in the pretext that they were renovating it. Further, that efforts to have them cease and desist from engaging in the contemptuous acts had been rebuffed and ignored. Additionally, the Respondents' actions of breach and violation of the subsisting order of this Court was causing immense damage to the suit property and the income therefrom.
8. The 2nd Respondent's position is that the 1st, itself, and 3rd Respondents did not breach the order of this Court issued on 25th May 2021, and the Applicant had failed to demonstrate that the 1st, 2nd and 3rd Respondents had knowledge or proper notice of the terms of the order on 25th May 2021 at about noon, when the suit property was sold to the 4th Respondent by a public auction attended by the Applicant's representatives. The 2nd Respondent contended that the impugned Court order was served on its advocates on record at 2.17 pm on 25th May 2021 after the suit property had been sold to the 4th Respondent, and that in compliance with the order, the 1st, 2nd and 3rd Respondents did not take further steps in completing the sale and transfer of the suit property to the 4th Respondent. Additionally, that the application is defective as the impugned order did not include a penal notice and therefore cannot form the basis for commencing contempt of court proceedings. Furthermore, the contempt proceedings against the 1st Respondent were defective as he was not a party to the proceedings in his personal capacity, as he is the Chief Executive Officer of the 2nd Respondent, which is a separate legal entity.
9. The 4th, 5th, 6th, and 7th Respondents' case was similar. They averred that the suit property was advertised for sale by public auction on 25th May 2021 at the auctioneer's office, and they attended the auction and the 4th Respondent made a bid for Kshs 563,000,000.00, which was declared the highest, paid the 10% deposit of Kshs 56,300,000/- to the 2nd Respondent, thereafter executed a memorandum & conditions of sale on the same date, and was told to await the completion documents for them to process payment of the balance of the purchase price. On 27th May 2021 after receipt of the deposit of the purchase price, the 2nd Respondent wrote to the 4th Respondent and indicated that completion of the sale and the subsequent transfer of the property had been suspended temporarily due to an injunction issued by the Court of Appeal in Civil Application No. E455 of 2023, and did not complete the sale of the property to them.



10. The 4th, 5th, 6th and 7th Respondents contend that at the time the auction took place, no Court order had been served upon the parties that participated in the public auction. They deponed that it was uncontested that the auction had been completed by noon and the Court order was served upon the 2nd Respondent at 2.17 pm by way of post. Therefore, that by the time the order of 25th May 2021 was brought to their attention on 27th May 2021 by the 2nd Respondent, the sale by public auction had taken place and they had paid deposit for the purchase price. Further, that to date, they had not been served with the order for whose contempt they were being cited; they were not party to the proceedings that culminated in the issuance of the order; and they had never been properly joined to the suit.
11. It was their assertion that the 4th Respondent was granted a facility of Kshs 50,000,000/- by the 2nd Respondent which was secured by a charge over LR No 30036/2 (IR No. 190140), on the strength of the fact that the suit property had a rental income that could sufficiently pay off the loan as soon as the sale was completed. However, that on 10th March 2023, and despite receiving the rental income from the suit property as from 25th March 2021, the 2nd Respondent issued a 90-day statutory notice threatening to exercise its statutory power of sale of the over the 8th Respondent's property LR. No 30036/2 (IR No. 190140) to recover the loan arrears. Therefore, faced with the possibility of foreclosure, the 4th, 7th and 8th Respondents filed suit, namely HCCOMM No. E140 of 2023 against the 2nd Respondent together with an application seeking interlocutory orders of injunction, and the Court directed that the rent that the 2nd Respondent had collected since 25th May 2021 to the date of the ruling be used to offset the loan arrears and all the future rent be paid to the 4th Respondent's bank account.
12. The 4th, 5th, 6th and 7th Respondents also denied being in contempt of this Court's order by receiving rent from suit property, which was an equitable remedy granted to them by the Court while the sale remains suspended, and the 2nd Respondent had not completed the sale as it is still awaiting a decision by this Court. Further, that they had not taken over the suit property and that the High Court only directed the tenants to pay the rent to their account pending the determination of this appeal and the High Court suit. Additionally, the orders of stay of execution of a substantive order could not be granted in an application for contempt, but only in the matter appealed from, and the orders on the rental income from the suit property or on investigations on fraudulent disposal of the suit property could not lie as the said property was still at the disposal of this Court and the High Court.
13. The 4th, 5th, 6th and 7th Respondents in addition filed a Notice of Preliminary Objection dated 19th January 2024, where they raised the following grounds:
 1. This Court lacks jurisdiction to entertain the application for contempt as the 5th, 6th and 7th Respondent were not parties to Nairobi Civil Application No. E140 of 2021-Kigio Group Company Limited v Housing Finance Company Limited & J.M. Gikonyo T/a Garam Investments from where the orders allegedly disobeyed emanate from.
 2. The orders of this Court issued in Nairobi Civil Application No. E140 of 2021-Kigio Group Company Limited v Housing Finance Company Limited & J. M Gikonyo T/a Garam Investments were in the nature of orders in personam and not orders in rem as to bind non-parties to the suit.
 3. The Notice of Motion dated 26th September 2023 is frivolous, vexatious and an abuse of the process if this Honourable Court and ought to be struck out.
14. The 8th and 9th Respondents on their part averred that they learnt about HCCOMM No. E140 of 2023 on 19th September 2023, when they were served with an application filed therein by the Applicant's



advocate, and denied being aware of, or participating in the proceedings in this Court or those in the High Court. They further denied being in contempt of this Court's orders and requested to be discharged from the proceedings. Their case is that the 8th Respondent entered into a sale agreement with the 4th and 7th Respondents for sale of LR No.30036/2 IR 190140 Mavoko Municipality on 15th June 2022, and they were not aware of the suit property.

15. We heard the application on the Court's virtual platform on 13th May 2024. Learned counsel Mr. Karuru Mwaura, appeared for the Applicant, learned counsel Mr Isaac Kiche holding brief for learned Senior Counsel Mr. Ohaga appeared for the 1st, 2nd and 3rd Respondents, learned Senior Counsel Mr. Ngatia SC appeared together with learned counsel Mr. Ambani Jusa for the 4th and 6th Respondents, learned counsel Mr. Kiplangat appeared for the 5th and 7th Respondents, and learned counsel Mr. Justin Nyaberi, appeared for the 8th and 9th Respondents. Save for Mr. Nyaberi, all the advocates highlighted their respective written submissions, and reiterated their respective cases. Mr. Nyaberi did not file any submissions and relied on the replying affidavit filed by the 9th Respondent.
16. In making his submissions and upon inquiry by the Court, Mr. Mwaura clarified that his main prayer was for citation of the Respondents for contempt of court, and that the remaining orders sought in the application flowed from and were consequential to the grant of the main prayer. He explained why the sale of the suit property was not warranted, and submitted that the Respondents had conspired and colluded to dispossess the Applicant of the suit property. Citing the decisions of this Court in *Econet Wireless Kenya Ltd v Minister for Information and Communication of Kenya & Another* [2005] KLR 828, *Mohamed Ibrahim; Teachers Service Commission v Kenya National Union of Teachers and 2 Others* [2013] eKLR, *Stephen Njoroge Gikera & Another vs Econite Mining Company Ltd & 7 others* [2018] eKLR and *Shimmers Plaza Ltd v National Bank of Kenya Ltd* [2015] eKLR, counsel submitted that this Court should assert its authority and find that all the Respondents collectively and individually violated the orders issued on 25th May 2021, with the intention of illegally dispossessing the Applicant of its suit property and clothing the theft with the order of the High Court.
17. In reply, Mr. Kiche submitted that the essential elements that must be demonstrated for one to prove contempt of court are firstly, that the terms of the order were clear, unambiguous and binding; secondly, the Respondent acted in breach of the terms of the order; and thirdly, the Respondent's conduct was deliberate. Reliance was placed on the decision of this Court in *Shimmers Plaza Limited vs National Bank of Kenya Limited* [supra], that the Court must satisfy itself beyond any shadow of doubt that the person alleged to be in contempt committed the act complained of with full knowledge or notice of the existence of the order of the Court forbidding it. Counsel further cited the case of *Gatharia K. Mutikika vs Baharini Farm Ltd* [1985] KLR 27 where it was held that contempt of Court is an offence of a criminal character and must be satisfactorily proved by a standard which is higher than proof on a balance of probabilities, and almost but not exactly beyond reasonable doubt.
18. Counsel further submitted that the 1st, 2nd and 3rd Respondents did not have knowledge or notice of the impugned order at the time, namely 12 pm, when the suit property was sold by public auction to the 4th Respondent, and only became aware of the impugned order on 25th May 2021 at 2.17 pm when it was served on their advocates on record. On whether the impugned order could form the basis for the contempt of court proceedings, counsel submitted that procedurally, the law requires personal service of the order and a penal notice was required to accompany the Notice of Contempt to the contemnor. The impugned order however did not contain a penal notice. Reference was made to section 5 (1) of the *Judicature Act* to the effect that this Court has the same power to punish for contempt of Court as was for the time being possessed by the High Court of Justice of England and Rule 81.4 of the English Civil Procedure Rules. The decision in *Vimalkumar Bhimji Depar Shah & Another v Stephen*



Jennings & 5 Others [2016] eKLR were cited for the requirement that any order allegedly breached or disobeyed should include a penal notice.

19. Mr. Ngatia SC on his part cited the decisions in Michael Sistu Mwaura Kamau v Director of Public Prosecution & 4 Others [2018] eKLR and Shimmers Plaza Limited vs National Bank of Kenya Limited [supra] to the effect that it was important for the Court to satisfy itself beyond any shadow of a doubt that the person alleged to be in contempt committed the act complained of with full knowledge or notice of the existence of the order of the Court forbidding it, and that the Applicant needs to demonstrate that the Respondents were aware of the order of 25th May 2021. It was his position that that the hammer had fallen and the auction completed more than 2 hours before the said order was received from the Court, and the stay order was therefore not breached as none of the participants in the auction had been served with any order at the time of the public auction. Senior Counsel also cited the decision by the Supreme Court of Kenya in Githiga & 5 Others v Kiru Tea Factory Company Ltd [2023] KESC 41 (KLR) for the proposition that contempt proceedings require a higher standard of proof than in normal civil cases and one can only be committed to civil jail or penalized on the basis of evidence that leaves no doubt as to the contemnor's liability.
20. Similar submissions were made by Mr. Kiplangat, who in addition asserted that the 4th Respondent only took possession of the suit property in September 2023 upon the grant by the High Court of an order to collect rent from the suit property, and pursuant to the ruling of the High Court in HCCOMM Case No. E140 of 2023.
21. This Court (P. Kihara Kariuki (P), Maraga & Ouko, JJ.A), held in Christine Wangari Gachege v Elizabeth Wanjiru Evans & 11 Nairobi Civil Application No. 233 of 2007 [2014] eKLR

Others, that the English law on committal for contempt of court under Rule 81.4 of the English Civil Procedure Rules, which deals with breach of judgment, order or undertakings, was applied by virtue of section 5(1) of the *Judicature Act*; and that leave to commence contempt of court proceedings is not required under Rule 81.4 where committal proceedings relate to a breach of a judgment, order or undertaking. In *Shimmers Plaza Limited v National Bank of Kenya Limited* [supra], it was held that Rule 81.5 governs service of the judgment or order which must carry a penal notice; the service must be carried out before expiry of the period to perform an act, and that Rule 81.6 provided that service must be done personally, but this may be dispensed with by the court under rule 81.8. The Court acknowledged that Kenya's growing jurisprudence has reiterated that knowledge of a court order suffices to prove service and dispense with personal service for the purposes of contempt proceedings, but emphasized that:

“it is important however that the court satisfies itself beyond any shadow of a doubt that the person alleged to be in contempt committed the act complained of with full knowledge or notice of the existence of the order of the Court forbidding it. The threshold is quite high as it involves possible deprivation of a person's liberty”.

22. The Supreme Court in *Githiga & 5 Others v Kiru Tea Factory Company Ltd* (supra) confirmed that Courts possess the inherent power to enforce compliance with their lawful orders, and noted that the *Contempt of Court Act* having been declared unconstitutional in *Kenya Human Rights Commission v Attorney General & Another* [2018] eKLR on November 9, 2018, the instructive provision remains section 5(1) of the *Judicature Act* which grants the High Court and the Court of Appeal the power to punish for contempt.



23. The Supreme Court in addition held as follows as regards the procedure and standard of proof in contempt of court proceedings:

“ 58. In enforcing compliance with lawful court orders, the procedures adopted by the court must be fair and reasonable in which full opportunity is given to an alleged contemnor to defend himself or herself. This is because contempt proceedings being quasi-criminal, require a higher standard of proof than in normal civil cases, and one can only be committed to civil jail or penalized on the basis of evidence that leaves no doubt as to the contemnor’s culpability.

59. This was the position taken by this court in Republic v Ahmad Abolfathi Mohammed & another SC Criminal Application No 2 of 2018 [2018] eKLR where we stated:

“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 Baharini Farm Limited [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 the 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.”

24. In order to succeed in an application for contempt of court, an applicant must therefore prove the terms of the order; knowledge of the terms by the respondent and failure by the respondent to comply with the terms of the order. These requirements were reiterated by this Court in Micheal Sistu Mwaura Kamau v Director of Public Prosecutions & 4 Others [supra] as follows:

“It is trite that to commit a person for contempt of court, the court must be satisfied that he has willfully and deliberately disobeyed a court order that he was aware of. That is made absolutely clear by section 4 of the *Contempt of Court Act* and the ruling of the Supreme Court in Republic v Ahmad Abolfathi Mohammed & Another (supra).

Secondly, as this Court emphasized in Jihan Freighters Ltd v Hardware & General Stores Ltd and in A.B. & Another v R. B. [2016] eKLR, to sustain committal for contempt of court, the order of the court that is alleged to have been deliberately disobeyed must be clear and precise so as to leave no doubt as to what a party was supposed to do or to refrain from doing. Lastly, the standard of proof in committal proceedings is higher than proof on a balance of probabilities, though not as high as proof beyond reasonable doubt. (See Mutitika v. Baharini Farm (supra) and Republic v Ahmad Abolfathi Mohammed & Another (supra).”



25. In the present application, the order by this Court (Musinga (P), Murgor, & Kantai JJA) dated 25th May 2021 was as follows:

“This application coming up for hearing on written submissions with no appearance of counsel. Ruling on the 9th July, 2021. The sale by public auction scheduled to take place today 25th May, 2021 is hereby stopped pending delivery of the ruling.”

26. The contention by the 1st, 2nd and 3rd Respondents that the order was served on them at 2.17 pm on 25th May, 2021 was supported by a copy of an email from the Deputy Registrar of the Court of Appeal serving the said order which were both exhibited in their replying affidavit, and showed that the service was effected upon the advocates on record for the Applicant and the 1st, 2nd and 3rd Respondents. The Applicant did not provide evidence that it served the order containing a penal notice on any of the respondents. Lastly, it is not contested that the sale of the property by auction took place at 12 noon on 25th May 2021 as this was confirmed by affidavits annexed to the application that were sworn by the Applicant’s representatives.

27. Notably, in an affidavit at pages 154 to 155 of the application sworn on 3rd June 2021 by one Japheth Ogamba Nyasimi, it is averred therein as follows:

“

“2. That, I am a registered process server at Karuru Mwaura & Company• Advocates.

3. That, the firm represents Kigio Group Company Limited.

4. That, on the 25th May 2021 at 10:30 am I together with Moraa Nyakundi, an Advocate at the firm and Jemimah Mwebi, my other colleagues, headed to Western Heights where the offices of Garam Investment are located.

5. That, upon arrival we confirmed that the auction of our Client’s property was taking place in their premises at 11:00am.

6. That, we served them with a letter which they refused to acknowledge receipt.

7. That, at around 11:30 am more people came in from Mr. Gikonyo’s office into the auction room.

8. That, at around 12.00 pm the auction started led by Mr. Gikonyo.”

Similar averments are made in an affidavit by Moraa Nyakundi sworn on 3rd June 2021 which is at page 156 – 157 of the application.

28. We therefore find that the Applicant has not proved to the required standard that the Respondents either served with, or were of this Court’s order of 25th May 2021 at the time of the auction of the suit property at 12 noon on 25th May 2021. The 1st to 4th Respondents are therefore not culpable of breach of the said order by participating in the said public auction.

29. We also need to address the contention that the Respondents were in breach of the orders of 25th May 2021 by their subsequent actions of participating in the proceedings in HCCOMM No. E140 of 2023, in which orders of mandatory injunctions in relation to the rental income from the suit property were given. In this respect, we note that the 4th, 5th, 6th and 7th Respondents averred that they were informed of the Court order issued on 25th May 2021 by the 2nd Respondent on 27th May 2021. The Court order



of 25th May 2021 was specific on the act that was required not to be done, which was “the sale by public auction scheduled to take place today 25th May, 2021”. No order was exhibited by the Applicant that stopped any actions in respect of the orders granted by the High Court on 4th September 2023 in HCCOMM No. E140 of 2023, or of service of any such order on the 1st to 8th Respondents.

30. In the circumstances, we hold and find that the Respondents were not in contempt of the orders made by this Court on 25th May 2021 by dint of the subsequent proceedings and orders granted by the High Court in HCCOMM No. E140 of 2023.
31. The application dated 26th September 2023 is accordingly not merited, and is hereby dismissed with costs to the Respondents.
32. Orders accordingly.

DATED AND DELIVERED AT NAIROBI THIS 31 ST DAY OF JULY, 2024.

D. K. MUSINGA, (P.)

JUDGE OF APPEAL

.....

ASIKE-MAKHANDIA

JUDGE OF APPEAL

.....

P. NYAMWEYA

JUDGE OF APPEAL

I certify that this is a true copy of the original Signed

DEPUTY REGISTRAR

