



**Ouru Power Limited & another v Julius Mogaka Gekonde t/a E-Smart Technical College
(Civil Appeal 14 of 2017) [2022] KECA 1030 (KLR) (23 September 2022) (Judgment)**

Neutral citation: [2022] KECA 1030 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT KISUMU
CIVIL APPEAL 14 OF 2017
W KARANJA, S OLE KANTAI & M NGUGI, JJA
SEPTEMBER 23, 2022**

BETWEEN

OURU POWER LIMITED 1ST APPELLANT

JOSEPH O. NYACHOTI T/A MINMAX AUCTIONEERS 2ND APPELLANT

AND

**JULIUS MOGAKA GEKONDE T/A E-SMART TECHNICAL
COLLEGE RESPONDENT**

*(Being an appeal from the ruling and order of the High Court of Kenya at
Kisii (W.A. Okwany J.) dated 7th December, 2016 in Kisii HCC No. 34 of 2015)*

JUDGMENT

1. In the ruling dated December 7, 2016, Okwany J., having found that the 2nd appellant had disobeyed orders issued by the court on March 7, 2016, made the following substantive orders:
 - “ a) That the Officer Commanding Kisii Police Station (OCS) do search, arrest, and detain motor vehicle registration number KBY 187A Isuzu Bus pending further orders of this court.
 - b) That the 2nd defendant herein, do personally appear before this Court to explain why appropriate sanctions should not to be taken against them in light of his disobedience of lawful court orders.
2. Aggrieved by the ruling and orders of the court, the appellants filed the present appeal in which they raised 12 grounds of appeal in their memorandum of appeal dated February 15, 2017. Their core arguments in these grounds are that the trial court had erred in law and fact in finding and holding that: the appellants had neither supplied nor discovered new and important facts which would have



warranted the review of the limb of the order concerning the release of the motor omnibus Registration Number KBY 187A ('the omnibus'); had adopted a narrow and/or restrictive interpretation of the relevant provisions of the law, had fettered its discretion and thereby occasioned a miscarriage of justice; had erred in finding that it was not seized of jurisdiction to entertain and/or adjudicate upon the application for review on the basis that the application for review was tantamount to inviting the court to sit on appeal on its own decision; and had erred in failing to deal with and/or address the alternate ground of the application seeking for review founded on the existence of 'sufficient cause'; and had failed to properly or objectively evaluate the evidence on record and thereby arrived at a conclusion contrary to the weight of evidence.

3. The appellants also impugn the decision on the basis that the court had erred in holding that the appellants, and more particularly the 2nd appellant, had willfully disobeyed the orders of the court notwithstanding the fact that the limb of the said order had already been overtaken by events and/or was otherwise legally untenable; that the court erred in finding and holding that the 2nd appellant had disobeyed lawful court orders notwithstanding the existence of a reasonable and tenable explanation for the non-compliance relating to events that transpired long before the issuance of the court order.
4. Finally, the decision of the trial court is impugned on the basis that the court failed to properly exercise its discretion concerning the extent of the court's jurisdiction to punish for contempt; and for failing to appreciate the explanation offered by the appellants for non-compliance with the court's orders.
5. While the present appeal arises out of the ruling dated December 7, 2016, it is useful to summarise briefly the background leading to those applications and the impugned ruling.
6. The 1st appellant, Ouru Power Limited, had leased a portion of its premises situate on L. R. No. Kisii Municipality/Block III/3 to the respondent, Julius Mogaka Gekonde T/A E-Smart Technical College. A dispute arose with respect to the rent due and payable and the appellants levied distress against the respondent. The respondent then sued the appellants in Kisii HCCC No. 34 of 2015 claiming, inter alia, damages for illegal distress. He also filed an application dated October 27, 2015 seeking a temporary injunction to restrain the appellants from trespassing, entering into the suit premises and taking away the proclaimed goods or in any manner interfering with the respondent's tenancy pending the inter partes hearing and determination of the application.
7. The court certified the application urgent and fixed it for inter partes hearing on October 30, 2015. On that day and upon hearing Counsel for the parties, the trial court issued the following orders:
 - “ 1. That pending inter-parties hearing there be an order of temporary injunction issued against the Respondents by themselves, their servants, agents or any person acting under their instructions restraining them from trespassing, entering into demised premises and taking away the proclaimed properties of the Applicant evicting or in any manner interfering with the applicant's tenancy.
 2. That the application shall be heard inter-parties on 11th day of December.
8. Contemporaneously with the proceedings before the High Court, the appellants filed an application dated 29th October 2015 before the Chief Magistrate's Court in Kisii in Misc. Civil Application No. 114 of 2015. They sought in this application an order to break into the premises where the respondent's goods were kept and to execute instructions to levy distress. They were granted the said orders by the Chief Magistrate's Court.



9. On 2nd November 2015, the appellants filed an application seeking stay of the above orders. On his part, the respondent filed an application dated 4th November 2015 seeking, inter alia, the unconditional release of the omnibus. Adding to this flurry of applications, the appellants filed yet another application dated 3rd November 2015 seeking to have their application dated 2nd November 2015 heard urgently and the interim orders of injunction issued on 30th October 2015 set aside or varied.
10. Upon hearing the four applications before it, the trial court, in the ruling dated 7th March 2016, granted the respondent 15 days' stay of execution within which he should settle the outstanding arrears due to the appellant failing which the interim orders in his favour would lapse and the 1st appellant would be at liberty to issue a fresh proclamation for the purpose of distress for rent. The court also ordered the unconditional release of the omnibus. It noted that the attachment of the vehicle had been done in bad faith and was intended to pre-empt the outcome of the case before the High Court, steal a march on the respondent and circumvent the due process of the court.
11. The appellants then filed an application dated 14th March, 2016 seeking review of the orders issued on 7th March 2016. In the ruling dated 7th December 2016, the court declined to review its orders and dismissed the application, holding, inter alia, that the appellants had not demonstrated that there was new evidence that was not within their knowledge at the time of hearing the application to warrant the grant of orders of review.
12. The appellants' application dated 14th March 2016 was heard together with an application filed by the respondent dated 16th March 2016 seeking, inter alia, the cancellation of the 2nd appellant's licence and a finding that the appellants are guilty of contempt of court. This application was based on the grounds that the appellants had not complied with the orders made on 7th March 2016 for the unconditional release of the omnibus despite having been duly served with a copy of the said order together with a penal notice. The court found that the 2nd appellant, Joseph Nyachoti, had disobeyed the said orders and issued the orders set out earlier in this ruling, thus precipitating the present appeal.
13. The parties filed written submissions in support of their respective cases on the appeal. In submissions dated 10th August, 2020, the appellants contend that the trial court had not issued an order to restrain the sale of the respondent's motor vehicle when it was presented with the application dated 27th October 2015. Further, that on 30th October 2015, the court had issued interim orders but had left out the issue of the omnibus. As a result, the 2nd appellant had sold the omnibus on 18th November 2015. The appellants submit that as at 17th November 2015 when they filed their affidavit and submissions before the court, the vehicle not having been sold until the 18th of November 2015, they had not captured the fact of its sale in their affidavit.
14. They had therefore filed their application dated 14th March 2016 seeking review of the orders on the grounds of discovery of new and important evidence which was not laid before the court at the time of delivery of the ruling, and on the existence of sufficient cause. The court had therefore failed to appreciate the totality of the evidence in finding that the sale of the motor vehicle was not new and was within the knowledge of the appellants prior to the delivery of the ruling and order.
15. The appellants further submit that the court was under an obligation to consider the ground of 'other sufficient cause' that they had raised in their application for review. By failing to address this limb of the application, the trial court had failed to address and resolve an integral part of the application. The order for the release of the omnibus was therefore incapable of being realized, and there was therefore sufficient cause to grant the order for review. The appellants cite in support of their submission the case of *Wangechi Kimita v Wakibiru Mutahi* (1985)eKLR and *Shanzu Investment Limited vs*



Commissioner of Lands (1993)eKLR for the proposition that ‘any other sufficient cause’ need not be analogous with the other grounds set out in Order 45 Rule 1.

16. It is the appellants’ contention further that the trial court was all along aware of the attachment of the omnibus, having declined to grant any orders to stop its sale. There was therefore no basis for the court’s reasoning that the appellants were in contempt of its orders. According to the appellants, the court erred in taking the view that having been served with the pleadings in the suit in the High Court and notice of the scheduled hearing, but without a restraining order, that was sufficient to bar further action by the appellants.
17. The appellants submit that the trial court had been informed on 30th October 2015 that the omnibus had been attached on 29th October 2015. It had not issued any specific orders with regard to the omnibus but had instead stated that either party was at liberty to file an application to address the issue. The respondent had applied to the Magistrate’s Court and had been given an order restraining the sale of the omnibus on 17th November 2015. He had not, however, served the appellants until the 19th of November 2015, by which date the omnibus had been sold.
18. The trial court was therefore, in the appellants’ view, being unreasonable and averse to the prevailing evidence in ordering that the omnibus be released, and in finding that the appellants were in contempt of court. They could not comply with an order that required delivery of an item that was in the hands of a third party. The orders could not be enforced without further proceedings against the third party purchaser; and the appellants’ non-compliance with the orders could not be said to have been deliberate and/or willful to warrant a finding of contempt. The appellants seek support for this submission in the case of Rose Detbo v Ratilal Automobiles & others [2018]eKLR in which the Court found that there was no deliberate or willful breach of the orders of the court. They ask this Court to allow their appeal with costs.
19. The respondent opposed the appeal and filed submissions dated 20th November, 2020. It is the respondent’s submission that the trial court was right in reaching the conclusion that there was no discovery of new and important matter or evidence which was not within the knowledge of the appellants at the time of hearing of the applications the subject of the ruling dated 7th March 2016.
20. The respondent submits that upon being served with the orders issued by the trial court on 27th October, 2015, the appellants had, on 29th October 2015, filed Miscellaneous Application No. 114 of 2015 in the Magistrate’s Court seeking orders for the attachment and sale of the omnibus. The Magistrate had ordered that the application be served upon the respondent, but the appellants did not comply. On 30th October, 2015 when the trial court granted interim orders, the appellants did not disclose to the court full information, inter alia, that they had obtained orders from the Magistrate’s Court and had attached the omnibus. They were now asking this Court to find that, notwithstanding the pendency of the suit and the orders made on 30th October 2015, they were perfectly in order to obtain orders from the Magistrate’s Court and sell the omnibus.
21. The respondent submits further that the trial court had properly addressed itself to the issue of ‘sufficient cause’ as a basis for reviewing its order. Additionally, the trial court’s decision was in accord with the twin principles of lis pendens and the oxygen principles in the Civil Procedure Rules. Support for the respondent’s submission is sought in the case of Carol Silcok vs Kassim Sharraf Mohamed (2013) eKLR and Manuji vs U.S International University and Another (1976-80)KLR 229.
22. The respondent submits that the orders issued on 7th March, 2016 were binding on the appellants, and they had willfully disobeyed them. They could not be heard to say that the said orders had been overtaken by events or that they are legally untenable.



23. We have considered the record of the trial court, the appellants' grounds of appeal and the respective submissions of the parties. While the appellants have raised a plethora of grounds against the decision of the trial court, reduced to its core, their grievance raises only one issue for consideration: whether the trial court properly exercised its discretion in rejecting the appellants' application for review and making a finding that the appellants were in contempt of its orders issued on 7th March, 2016.
24. The power of the court to review its orders is provided for in section 80 of the *Civil Procedure Act* and Order 45 Rule 1 of the *Civil Procedure Rules*. This rule, which echoes for the most part the provisions of section 80 of the *Civil Procedure Act*, provides that:
1. Any person considering himself aggrieved—
 - (a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or
 - (b) by a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.
25. The appellants' application invoked the provisions of the said rule, which requires an applicant to demonstrate the discovery of 'new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge' or could not be produced by him at the time of passing the decree. In declining to allow the application for review, the trial court found that the appellants were aware that they had seized the respondent's omnibus and that they were prepared to sell it as at 17th November when they filed the replying affidavit to the application dated 27th October 2015. They were also aware that the issue of the release of the omnibus was one of the issues pending the court's determination on 7th March, 2016. In the trial court's view, the sale of the omnibus vehicle does not constitute a new and important matter of evidence which was not within the knowledge of the appellants at the time the ruling was rendered.
26. In reaching its decision, the trial court observed as follows:
- "46. I find that the defendants were still at liberty, any time before the pronouncement of the ruling on 7th March 2016, to seek the leave of the court to file a further/supplementary affidavit so as to bring into perspective the issue of the alleged sale of the suit motor vehicle since order 45 Rule 1 does not prescribe a time limit for the availing of such evidence and allows the production of such new evidence at the time before the decree is passed or order made.
 47. It is my finding that the defendants had ample time to furnish the court with the "new evidence" which opportunity they squandered and one can say that in this case, the alleged new evidence was not only within the knowledge of



the defendants, but that the defendants did not also exercise due diligence as is prescribed by the provisions of Order 45 Rule 1.”

27. We find no reason for faulting the trial court on its finding. The record of the trial court indicates that the appellants had been served with the application for an injunction filed by the respondent dated 27th October 2015 on 28th October 2015, with an indication that the application would come up for hearing on 30th October 2015. Despite such service, or perhaps because of such service, they had approached the Chief Magistrate’s Court on 29th October 2015 seeking orders to break into the respondent’s premises and seize the proclaimed goods. They were present in court on 30th October 2015 when the trial court had issued restraining orders, which they sought to stay or set aside by their applications dated 2nd and 4th November 2015.
28. Contrary to the appellants’ assertion, there is no indication that they informed the court on 30th October 2015 that they had attached the respondent’s omnibus the day before. By the time they filed their affidavit on 16th November 2015, they had already seized the omnibus and had advertised it for sale. The application dated 27th October 2015, pursuant to which restraining orders had been issued on 30th October 2015, was scheduled for hearing on 11th December 2015, but at no point did the appellants seek to inform the court that they had in fact disposed of the omnibus. Their contention in the application dated 14th March 2016 that the court should review the ruling as there was discovery of new evidence is clearly unsustainable.
29. The trial court also held, in dismissing the application for review, as follows:

“ 50. Even assuming that the issue of the sale of the suit motor vehicle was a new and important piece of evidence as alleged, would this court grant the orders for review sought.

51. I am afraid that the answer to the above question would still be to the negative. This is because in its ruling made on 7th March 2016, which is the subject of the instant review application, this court had extensively pronounced itself on the procedure adopted by the 2nd defendant in seizing the suit motor vehicle at a time when the case revolving around the distress for rent was still ongoing. This court had in part, in the said ruling observed as follows:

“In respect to the 3rd application filed by the plaintiff seeking the unconditional release of motor vehicle registration number KBY 187A that was attached by the Defendants on 29th October 2015, I note that the said attachment was done one day after the Defendants were served with the 1st application that was slated for inter partes hearing the following day on 30th October 2015. I agree with the Plaintiff’s contention that the said attachment, done under the guise of levying distress for rent, was conducted in bad faith and was intended to pre-empt the outcome of this case, to steal the match from plaintiff and circumvent the due process of this court. Even though the interim orders of injunction had by then not been granted, the Defendants were upon been (sic) served with the court documents, expected to be patient and exhibit respect to the law and the already initiated court process by holding their horses on any intended adverse action, pending the outcome of the court case.”



52. Having pronounced itself on the legality/propriety of the seizure of the suit motor vehicle as expressed hereinabove, my view is that the granting of orders of review over the suit motor vehicle as is sought by the defendants would be akin to this court sitting on appeal in its own judgment. It is also worthy to note that this court had, in the impugned ruling of 7th March 2016, also dealt, at length, with the propriety of the 2nd defendant instituting parallel proceedings before the lower court immediately he was served with the pleadings in this case whereupon this court found;

"The defendants do not deny that they were duly served with the initial pleadings and order of this court directing that the 1st application be heard on 30th October 2015. Instead of waiting for the hearing of the 1st application, the Defendants mischievously and in outright disregard to the rule of res sub judice (sic) stated in Section 6 of the *Civil Procedure Act*, rushed to jump the gun by filing a miscellaneous application and obtaining quick orders from the lower court in a move clearly calculated to defeat the case pending before this court and steal the match from the plaintiff. I note that it would not have costed (sic) the Defendants anything to await the due process of the law to run its course. This conduct by the Defendants does not augur well for the proper and fair administration of justice and it is for this reason that I allow part of prayer 3 only of the application dated 4th November 2015.

30. We are unable to find a basis for faulting the decision of the trial court with regard to the application for review, or for finding that the appellants were in contempt of the orders of the court. The appellants were, on 28th October 2015, served with an application seeking injunctive orders scheduled for hearing on 30th October 2015. The following day, they filed an application before the Chief Magistrate's court seeking orders to enter the suit premises and proceed with the distress for rent. On 30th October 2015, they appeared before the trial court, and restraining orders in respect of the distress were issued. It is disingenuous on their part to claim that they were not in contempt of court for selling the motor vehicle and failing to release it as directed on 7th March 2016 because no order specific to the motor vehicle had been issued on 30th October 2015. As the trial court noted:

" 68. As I had already observed in the ruling rendered on 7th March 2016, the seizure of the suit motor vehicle by the 2nd defendant the moment he became aware of the filing of the instant case was clearly meant to steal the match from the plaintiff and obstruct the due process of the court in rendering a decision in the whole case by pre-empting the courts verdict.

69. The defendants argued that the orders of temporary injunction issued by this court on 30th October 2015 did not restrain the advertisement and sale of the suit motor vehicle. ...

70. It is worthy to note that the said order was not made in isolation or out of the blue, but in the context of a suit and an application which the plaintiff had filed to complain about an impending distress for rent that the defendants had initiated against him. Consequently, the order of 30th October 2015 was



to restrain the defendants from interfering in any manner whatsoever with the plaintiff's tenancy pending the inter-partes hearing of the application.

71. It is my finding that proceeding to sell the suit vehicle in the face of orders restraining any interference with the plaintiff's tenancy pending inter-partes hearing was in itself contemptuous not only of the said court order, but also the ongoing proceedings that were still pending before the court. To my mind, an order restraining the interference with the plaintiff's tenancy covered any action of distress for rent pending the outcome of the application."

31. The appellants have argued that they could not obey the orders of the court as they had already sold the motor vehicle to a third party who was not bound by the orders of the court, and that the trial court should have addressed itself to and considered this 'sufficient cause' within the meaning of Order 45 Rule 1.

32. We are not satisfied that had the trial court addressed itself to this latter limb of the Rule, it would have reached a different outcome in its ruling. The law is that a third party who purchases a property which is the subject of litigation is indeed bound by the decision of the court. To hold otherwise would be to defeat the course of justice by allowing parties to dispose of property that is the subject of litigation. We agree with the holding in the authorities placed before us by the respondent. In *Carol Silcok -vs- Kassim Sharif Mohamed* (2013) eKLR, the court stated as follows:

"Every man is presumed to be attentive with what passes in the court of Justice of the state or sovereignty where he resides. Therefore, purchase made of property actually in litigation pendente lite for a valuable consideration and without any express or implied notice in point of fact affects the purchaser in the manner as if he had notice and will accordingly be bound by the judgement or decree in the suit."

33. Similarly, in *Manuji v U.S. International University and Another* (1976-80) KLR 229 the court adopted the principle of lis pendens expressed in the case of *Bellamy v Sabine* (1857) 1 De J 566, 584 that:

"It is ... a doctrine common to the Courts both of law and equity, and rests, as I apprehend, upon this foundation – that it would plainly be impossible that any action or suit could be brought to a successful termination, if alienations pendente lite were permitted to prevail. The plaintiff would be liable in every case to be defeated by the defendant's alienating before the judgment or decree, and would be driven to commence his proceedings de novo, subject again to be defeated by the same course of proceeding."

34. We are accordingly satisfied that the trial court properly exercised its discretion in declining to review its ruling dated 7th March 2016. It was also correct in finding that the appellants were in contempt of court, and in issuing the orders that it did. We therefore find no merit in the present appeal, and it is hereby dismissed with costs to the respondent.

DATED AND DELIVERED AT KISUMU THIS 23RD DAY OF SEPTEMBER, 2022

W. KARANJA

.....

JUDGE OF APPEAL

S. ole KANTAI



.....
JUDGE OF APPEAL

MUMBI NGUGI

.....
JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

