



Mutungi & 6 others v VIL Limited; Kaumbuthu t/a Mwenda Kaumbutu & Co Adovates & 4 others (Contemnor) (Cause 225 of 2017) [2023] KEELRC 569 (KLR) (2 March 2023) (Ruling)

Neutral citation: [2023] KEELRC 569 (KLR)

REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU
CAUSE 225 OF 2017
CN BAARI, J
MARCH 2, 2023

BETWEEN

MICHAEL KINYUA MUTUNGI & 6 OTHERS CLAIMANT

AND

VIL LIMITED RESPONDENT

AND

**ROBIN MWENDA KAUMBUTHU T/A MWENDA KAUMBUTU & CO
ADOVATES CONTEMNOR**

**STEPHEN KIMANI T/A KINYURU MERCHANTS
AUCTIONEERS CONTEMNOR**

**MICHAEL KIPRUTO KANDIE T/A EMINING QUARRY
LIMITED CONTEMNOR**

**KEVIN NZIOKA T/A SKYVIN LIMITED & ASOP ENTERPRISES
LIMITED CONTEMNOR**

**ERIC MWENDA KANYURU T/A SYDNEY PRIDE (K)
LIMITED CONTEMNOR**

RULING

1. Before Court is the Claimants/Applicants' motion dated 28th September, 2021, brought pursuant to Sections 3 & 5 of the *Judicature Act*, Sections 1A, 1B, 3A and 63(e) of the *Civil Procedure Act*, Order 22 Rules 1 & 2, Order 51 Rule 1 and Order 40 Rule 3(1) of the Civil Procedure Rules. The Claimants/Applicants seek orders THAT: -

i. Spent



- ii. The Contemnors/Respondents be directed to deposit sufficient securities in court in total sum of Kshs. 15,000,000.00(Kshs. 15 Million)
 - iii. This Honourable Court be pleased to lift the veil of incorporation for MWENDA KAUMBUTHU & CO. ADVOCATES, KIRIIYU MERCHANTS ACUTIONEERS, SKYVIN LIMITED, ASSUP ENTERPRISES LIMITED and SYDNEY PRIDE (KENYA) LIMITED and/or the Directors and/or shareholders be summoned to attend Court in person.
 - iv. Spent
 - v. A declaration do issue that the Contemnors/Respondents are in contempt of court orders issued on 9th October, 2017 and 28th December, 2017.
 - vi. This Honourable Court do find Robin Mwenda Kaumbuthu, Stephen Kimani, Kevin Mutiso Nzioka, Fresky Jepchirchir Bett, Monicah Ndunge Nzioka and Eric Mwenda Kanyuuru in contempt of court orders for blatantly and with impunity disobeying and acting contra to the orders issued by this court on 9th October, 2017 and 28th December, 2017, and mete out appropriate punishment.
 - vii. The Contemnor/Respondents be ordered to pay costs of this application.
2. The motion is supported by grounds on the face of the record and the affidavit of Jackson Mulilu. The crux of the application is that on 9th October, 2017, this Court (differently constituted) issued an order for attachment of the Respondent's equipment and motor vehicles, and further restrained the Respondent from disposing off the property. The Applicants further contend that further orders of attachment were again granted on 28th December, 2017.
 3. The Applicants aver that the Contemnor/Respondents disregarded, disrespected, ignored or neglected to comply with the court orders by concealing, disposing off, selling and/or purchasing either by themselves and/or through third parties the attached goods, equipment and motor vehicles with the sole purpose of defeating the judgment and/or award herein.
 4. The Applicants further aver that the Contemnors/Respondents are in contempt of the court orders issued on 9th October, 2017 and 28th December, 2017.
 5. The 1st Contemnors/Respondents opposed the application through a replying affidavit sworn by him on 26th November, 2021. The 1st Contemnor/Respondent avers that he was instructed by the Claimants to conduct the matter on their behalf, and which he did until 13th February, 2020, when the Claimants/Applicants filed a notice of change of Advocates.
 6. The 1st Contemnor/Respondent further avers that the instant application is incurably defective on the basis that the affidavit in support does not disclose the authority said to have been granted the deponent, one Jackson Mulilu, to swear the affidavit on behalf of the other Claimants/Applicants.
 7. The 1st Contemnor avers that the orders subject of this application emanated from an application dated 27th September, 2017, while he was instructed on 27th October, 2017. He further avers that he filed an application dated 2nd December, 2017, on behalf of the Claimants/applicants and obtained the orders of 28th December, 2017.
 8. It is the 1st Contemnor/Respondent assertion that he issued instructions to the 2nd Contemnor/Respondent to attach the goods and not instructions to sell as alleged. It is his further assertion that instructions were withdrawn from him and hence does not know the current status of the goods.



9. The 3rd and 4th Contemnors/Respondents likewise opposed the motion vide a replying affidavit sworn on 29th November, 2021, by Kevin Mutiso Nzioka. The 3rd and 4th Contemnors/Respondents aver that they are separate legal entities from the companies that conducted the sale and should be treated as such.
10. The 3rd and 4th Contemnors/Respondents aver that there is no explanation for the Claimants/Applicants seeking to be paid Kshs. 15,000,000/-. They further aver that no proof has been given to inform the aversion of collusion between themselves and the 1st Contemnor.
11. The rest of the Contemnors/Respondents did not oppose the application.
12. Parties canvassed the application through written submissions, and submissions were filed for the Claimants/Applicants, the 1st, 3rd and 4th Contemnors.

The Claimants/Applicants Submissions

13. It is submitted for the Claimants/Applicants that nowhere in the supporting affidavit has the deponent purported to swear the affidavit on behalf of the other Claimants, but has instead sworn it on his own behalf.
14. The Claimant/Applicant further submits that he had sought leave of the Court to lift the Corporate veil of the Respondents and hence the reason he joined the Contemnors to the proceedings.

The 1st Contemnor/Respondent Submissions

15. The 1st Contemnor submits that it has been largely settled that for one to be held guilty of contempt, the orders subject of the contempt must be clear and unambiguous, the defendant has proper knowledge of the notice of the terms of the order, the defendant has acted in breach of the order and that the defendant's conduct is deliberate. He had reliance in Cecil Miller v Jackson Njeru & Another (2017) eKLR to support this position.
16. The 1st Contemnor further submits that the orders of the Court issued on 9th October, 2017, were very clear and had no ambiguity. It is his submission that the orders expressly required the attachment of the Respondent's equipment and motor vehicles and further restrained the Respondent from disposing of them.
17. The 1st Contemnor submits that having drafted the application that gave rise to the order of 28th December, 2017, he was fully aware of the existence of that order.
18. The 1st Contemnor further submits that he made all effort to ensure the Claimants got their dues and that he did not breach the terms of the order. He submits that he does know the status of the equipment subject of the attachment as the Claimants have since withdrawn instructions from him.
19. The 1st Contemnor further submits that he was unaware of the auction that took place on 1st December, 2017 and that he sought clarification from the auctioneer and subsequently withdrew his services.
20. It is the Contemnor's further submission that one of the Claimants name Michael Kinyua Mutungi, entered into an agreement with Syde Pride (K) Limited and with the authority of the other Claimants, to disassemble, haul, transport and temporarily store some of the goods that the court ordered to be attached.



21. It is the 1st Contemnors submission that he witnessed the agreement between Michael Kinyua Mutungi and Syde Pride (K) Limited because he believed the service was only to disassemble, haul, transport and temporarily store some of the goods. It is his submission that at no point had he participated in concealing, disposing off, selling and/or purchasing the attached goods with an intention to defeat the judgment of the court.

Submissions by the 3rd and 4th Contemnor/Respondents

22. It is submitted for the 3rd and 4th Respondents that they were not aware of the existence of the orders of the court subject herein. It is their submission that they were never served with the orders and could therefore not have failed to comply.
23. The 3rd and 4th Contemnors further submit that no proof has been given to show that the equipment and motor vehicles were transferred to them. It is their further submission that the Applicant has not been able to discharge the burden to prove that they are in contempt of court.

Determination

24. I have considered the motion, the grounds and affidavit in support, the replying affidavits and the parties' submissions. The issues for determination are:
- i. Whether the affidavit in support of the motion is incurably defective; and
 - ii. Whether the Contemnors/Respondents are in contempt of court
25. On the questions of whether the affidavit in support of the applicant's motion is incurably defective, the Counsel for the Applicant has submitted that the Applicant has not purported to swear the affidavit on behalf of his Co-Claimants/Decree holders, and that instead, he deposed the same solely in his right as a Claimant in the matter.
26. This position was not controverted in the Contemnors subsequent submissions. The affidavit having been sworn by the Applicant in support of his application and it not being intended to represent the position of his Co-Claimants, is thus found not to be defective.

Whether the Respondents are in Contempt of Court

27. On whether the Respondents are in contempt of court, The Black's Law Dictionary (Ninth Edition) defines contempt of court as:
- “Conduct that defies the authority or dignity of a court. Because such conduct interferes with the administration of justice, it is punishable usually by fine or imprisonment.”
28. In Kenya Tea Growers Association Vs Francis Atwoli and 5 Others [2012] eKLR Lenaola J cited with approval the case of Clarke and Others Vs Chadburn & Others [1985] 1All E.R (PC), 211 where the court stated:
- “I need not cite authority for the proposition that it is of high importance that orders of the courts should be obeyed, willful disobedience to an order of the court is punishable as a contempt of court, and I feel no doubt that such disobedience may properly be described as being illegal....”
29. Further, as correctly submitted by the 1st Respondent, it has been largely settled that for one to be held guilty of contempt, the orders subject of the contempt must be clear and unambiguous, the defendant



has proper knowledge of the notice of the terms of the order, the defendant has acted in breach of the order and that the defendant's conduct is deliberate. (See Cecil Miller v Jackson Njeru & Another (2017) eKLR)

30. The 1st Contemnor/Respondent has told the Court that he had knowledge of one of the orders having filed the application that gave rise to the order. He also confirmed that the court order was clear and unambiguous.
31. The 1st Contemnor/Respondent's assertion that he witnessed an agreement between one of the Claimant's named Michael Kinyua Mutungi, and Sydney Pride (K) Limited, the 5th Contemnor/Respondent, and that Mr. Michael Kinyua Mutungi had the authority of the other Claimants, to disassemble, haul, transport and temporarily store some of the goods is what raises questions, as a reading of Clause 2 (c) of that agreement states:

“ Full payment will be due in three months subject to the sale of the attached equipment by public auction, which shall be held within a period of three months and the monies collected from such sale shall go to reimburse all costs incurred by service providers as well as invoices due in 2 (a) and 2 (b) above, while the residual shall accrue to the client.”
32. Further, the 1st Contemnor/Respondent had instructions to conduct the matter on behalf of the Claimants until 13th February, 2020. The sale of the equipment as shown by the advertisement happened within the time the 1st Contemnor/Respondent had instructions to act, but took no steps to stop the sale and secure the equipment, save for withdrawal of instructions from the auctioneer after the fact.
33. That the 1st Contemnor/Respondent witnessed an agreement to amongst others sell the attached goods when the orders issued were only orders to attach, confirms the Claimant/Applicant's assertion that he indeed participated in concealing, disposing off, selling and/or purchasing the attached goods with an intention to defeat the judgment of the court.
34. The 1st Contemnor/Respondent acted for the Claimants. He knew the stage at which the equipment and motor vehicles attached would be available for sale.
35. This said, I note that the orders subject of the contempt proceedings, were not directed at the 1st Contemnor/Respondent as he was not a party to the suit herein. Further, the chronology of events in this matter as spelt out herein, raise a totally new cause of action. In my view, this is a matter of professional misconduct whose remedy lies elsewhere other than this court.
36. The applicant herein was cross-examined on his supporting affidavit. He told the Court that the 3rd and 4th Respondents were not party to the suit when the orders subject of the contempt proceedings were issued. He further told the court that the orders were directed at the parties to suit.
37. The Applicant's admission that the 3rd and 4th Respondents were not subject to the orders herein and not having shown that they were at any point served with the orders, goes to confirm that the 3rd and 4th Respondents did not know the terms of the orders, and could thus not be said to have deliberately disobeyed the orders. In *Katsuri Limited v Kapurchand Depor Shah* (2016) eKLR, the Court citing *Kristen Carla Burchell v Barry Grant Burchell* (Eastern Cape Division Case No. 363 of 2005), held: -

“In order for an application to succeed in civil contempt proceedings, the applicant has to prove:

- i. The terms of the order



- ii. Knowledge of the terms by the Respondent,
- iii. Failure by the Respondent to comply with the terms of the order.”

38. For the 3rd and 4th Respondent, I hold that the Applicant’s motion does not meet the threshold set in the cases cited herein. The 3rd and 4th Respondents are not guilty of contempt of Court, and I so find.

39. In whole I conclude by finding the application lacking in merit and is hereby dismissed.

40. I make no orders on costs.

41. Orders accordingly.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT KISUMU THIS 2ND DAY OF MARCH, 2023.

CHRISTINE N. BAARI

JUDGE.

Appearance:

Mr. Makori present for the Claimants/Applicants

Mr. Mwenda one of the Respondent present in person

Mr. Khamala present for the 3rd & 4th Respondents/Contemnors

Ms. Christine Omollo-C/A

