



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 1527 OF 2015

(Before Hon. Lady Justice Hellen S. Wasilwa on 19th September 2019)

PROF. PAUL MUNGAI MBUGUA.....CLAIMANT

VERSUS

THE REGISTRED TRUSTEES OF

PRESBYTERIA UNIVERSITY OF EAST AFRICA.....RESPONDENT

JUDGMENT

1. The Application before this Court is the Respondent's Application dated 3rd May 2019 seeking to cite the Claimant, his Counsel and Auctioneers for contempt of this Court's Orders issued on 4th, 18th, 25th and 30th of April 2019. In particular, the Claimant seeks the following orders:-

a. Spent.

b. THAT this Honourable Court be pleased to cite counsel for the Claimant, Mr. James Thuku for contempt of court and punish him by imprisonment for a period not exceeding 6 months or a fine not exceeding KShs. 10,000.00 or both such fine and such imprisonment deliberately and flagrantly disobeying the orders of this Court made on 4th, 18th, 25th and 30th April 2019.

c. THAT this Honourable Court also be pleased to punish the director or directors of General Rift Valley auctioneers for contempt of court and commit her/him/them to imprisonment for a period not exceeding 6 months or a fine not exceeding KShs. 10,000.00 or both such fine and such imprisonment deliberately and flagrantly disobeying the orders of this Court made on 4th, 18th, 25th and 30th April 2019.

d. THAT this Honourable Court be pleased to punish the Claimant namely Prof. Mungai for contempt of court and commit him to imprisonment for a period not exceeding 6 months or a fine not exceeding KShs. 10,000.00 or both such fine and such imprisonment deliberately and flagrantly disobeying the orders of this Court made on 4th, 18th, 25th and 30th April 2019.

2. The grounds upon which the Application is founded are that the General Rift Valley Auctioneers attached the Respondent's movable goods on 21st March 2019 pending the hearing of their Application for stay of execution. On 1st April 2019, the auctioneers took the Respondent's motor vehicle registration number KBN 442X which had previously not been attached or proclaimed.

3. On 4th April 2019, this Court granted the orders for stay and an order to release the motor vehicle was issued on 18th April 2019. Contrarily, the Claimant, his Counsel and the auctioneers sold the motor vehicle. As a result, orders were issued on 25th April 2019 directing the Claimant to reverse the sale and release the vehicle to the Respondent. The vehicle is yet to be surrendered.

4. The Respondent avers that this Court has the discretion to grant the orders sought and it is mete and just that the orders sought be granted.

5. The Application is supported by the Affidavit of Mugao Domenic and is based on the grounds on the face of the motion. Save that the Affidavit avers that motor vehicle registration number KBN 422X is a 10-seater Toyota Hiace which the Respondent uses on a daily basis to ferry nursing students to and from for practicals to Kiambu Level 5 hospital and other hospitals in Nairobi. In its view, the position in law is that goods not proclaimed should not be attached.

6. The Application has been opposed by the Claimant's Notice of Preliminary Objection, his Replying Affidavit and the Replying Affidavit

of Judy Juma swearing the same on behalf of the auctioneers.

7. The grounds for the Preliminary Objection are that the Application is fatally defective, an abuse of the court process and contrary to the law for seeking prayers against the Claimant's counsel, which prayers, also violate the Claimant's right to be heard.

8. Further, the Application is premised on non-existent court orders purportedly issued on 25th April 2019 and is based on misrepresentation, blatant falsehoods and violation of key evidentiary principles and provisions by the Respondent's counsel.

9. In his Affidavit, the Claimant avers that on 13th September 2017 the Respondent was issued with a letter asking him to settle the awarded amount but refused to do so. The Respondent's assets were first proclaimed on 13th October 2017 by Cash Gate Auctioneers but the Respondent made a payment proposal on 6th November 2017 though it was not honoured. The Respondent was issued with a second proclamation on 10th April 2018 by Clear Real Traders but on 24th May 2018 the Respondent made a payment proposal which it did not honour.

10. The third proclamation was done on 21st March 2019 by General Rift Valley Auctioneers. However, the Respondent filed an Application to be allowed to pay the decretal sum in instalments and the Court allowed the same directing the Respondent to liquidate the decretal amount in monthly instalments of KShs. 250,000.00. He avers that he was never served with the Order.

11. The Claimant avers that the Application did not address the issue of attached assets, payment of the auctioneers' charges or stopping sale of motor vehicle KBN 442X. As such, the motor vehicle was attached on 1st April 2019.

12. It is his deposition that the Respondent is abusing the process of this Court to avoid paying the decretal sum and that in issuing the order of 18th April 2019, the Court was not seized with the full facts of the matter. He denies his Advocates' participation in the attachment and contends that they were in Court on that material 18th April and that the orders were not directed at them. He denies disobeying this Court's orders.

13. The auctioneers' case is that Respondent was served with a notification of sale for the impugned motor vehicle. On 5th April 2019, they were advised by the Claimant that this Court had issued orders on 4th April 2019, for stay of execution hence they should only recover their fees. They communicated this to the Respondent's official who promised to pay but instead called the police and reported that the car was stolen.

14. The car was advertised for sale on 11th April 2019 and sold on 18th April 2019, after which, Leakey storage was ordered to release the car to the buyer. It is their position that property passes at the fall of the hammer hence the motor vehicle is not available for release to the Respondent since they do not have possession or know of its whereabouts. As such, there was no misconduct involved as the sale was lawful.

15. The Affiant avers that the auctioneers have never been served with the Court orders issued on 4th April 2019 stopping the sale, or those of 18th and 30th April 2019 ordering the release of the motor vehicle. This was contrary to rule 12(4) of the Auctioneers Rules.

16. It is the Affiant's averment that the orders issued on 4th April 2019 did not issue directions to stop or reverse the sale of the vehicle or declare it illegal, as such there was no contempt of court. The Respondent contends that in implementing the warrants of attachment, an auctioneer is an officer of the Court hence not directed or controlled by an advocate.

17. The Application was disposed of through written submissions. The Claimant filed his written submissions on 13th June 2019 while the Respondent filed theirs on 14th June 2019.

18. The Respondent submits that the Claimant had knowledge of the orders as his counsel was in court when the orders were issued. This position was communicated to the auctioneers as evidenced in paragraph 11 of Judy Juma's Affidavit. As such, they were in contempt of court. The Respondent relies on **Justus Kariuki Mate & Another vs. Martin Nyaga Wambora & Another [2014] eKLR, Gladys Vuldi & Another vs. Daniel Kipketer Rugut [2019] and Mwaniki Silas Ngari vs. Prof John S. Akama & Another [2015] eKLR.**

19. It is their submissions that the cited parties breached the court orders made on 4th and 18th April 2019. The Claimant's Advocate was in court and instructed the auctioneers to sell the motor vehicle despite the Court issuing orders for stay and allowing the Respondent to make payments in installments. The Respondent concludes by submitting that the disobedience of a court order should not go unpunished.

20. On the other hand, the Claimant submits that the Application has been premised on laws that do not support the orders sought such as Order 28 (1) of the Employment and Labour Relations Court (Procedure) Rules and Article 159 (1) of the Constitution of Kenya.

21. It is the Claimant's submissions that suing his advocate is a breach of his right to legal representation and his advocate's independence which is an essential component of the rule of law. It is his position that no order was breached by his advocates and asserts that advocates are privileged when prosecuting cases hence cannot be held liable. He relies on the case of **Amos K. C. Kale & Another vs. Rebecca Gesora & Another [2017].**

22. The Claimant also submits that the Application is contemptuous and malicious as it seeks orders to punish the cited parties for disobeying orders that do not even exist. It is his position that this Court did not issue any orders on 25th April 2019 directing the reversal of the sale of the impugned motor vehicle.

23. The Claimant also submits that the Application is based on misrepresentation and falsehoods hence is not deserving of this Court's discretion and relies on the case of **Alphonse Lindi Riage vs. Commissioner for Cooperatives Development [2016] eKLR**. The Claimant has also submitted that there was no breach of the orders issued on 25th April 2019 and that the order of 18th April 2019 had a precondition of the Respondent paying the auctioneers KShs. 100,000.00. As such, the orders could not be breached hence there was no contempt of court. He relies on the case of **Wobum Estate Limited vs. Margaret Bashforth [2016] eKLR**.

24. I have examined all the averments on record. On 18/4/2019, the Respondent appeared before Hon. J. Onyango in an application seeking return of motor vehicle attached by the Auctioneer when it was not on the list of attached goods.

25. Counsel for the Claimant was also present in Court and sought to reply to this application. However, upon hearing the Parties, Hon. J. Onyango directed the Auctioneer to release motor vehicle KBN 442 X upon payment of Kshs.100,000/= pending taxation of Auctioneer's fees or on agreement of fees by the Parties.

26. The application was fixed for mention on 25/4/2019 before me and on 25/4/2019, when the Parties appeared the Judgement Debtor's Counsel intimated that they deposited the money on 15/4/2019 as directed by Court.

27. The Counsel for Claimant/Decree Holder however informed Court that the motor vehicle in question had been sold on 18/4/2019.

28. I note that on 18/4/2019 is when the Hon. J. Onyango ordered the motor vehicle returned by Auctioneer. The Decree Holder avers that the orders were issued late when the sale had already taken place.

29. The Applicant avers that the goods had been proclaimed on 21/3/2019 and among the proclaimed goods, motor vehicle KBN 442 X was not amongst them. This position appears to be true because this proclamation is not signed by the Debtor as compared to the proclamation done earlier where the Debtor signed it.

30. On 5/4/2019, the Counsel for the Claimant had written to General Rift Valley Auctioneer indicating that the Court had issued stay orders on 4/4/2019. There was also an order that the decretal sum be paid in instalments of 250,000/= every month but 500,000/= was to be paid by 15/4/2019. When matter came for mention on 25/4/2019, the Judgement Debtor's Counsel informed Court that they had made the deposits as ordered by Court.

31. By 18/4/2019 when the motor vehicle was therefore sold, the Decree Holder was definitely in breach of this Court's orders and the Counsel who instructed the auctioneer was aware of the stay orders.

32. In the circumstances, it is true that the Decree Holder was aware of orders of stay notwithstanding other orders for release of motor vehicle which they say had been overtaken by events. By proceeding with the sale, the Decretal Holder and Auctioneers were in contempt of this Court's orders and I find them so and cite them for contempt accordingly.

Dated and delivered in open Court this 19th day of September, 2019.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Mungania for Judgement Debtor – Present

Mudawo holding brief Thuku for Decree Holder – Present