Kibira v Dapalk Consortium Company Limited (Commercial Civil Suit E121 of 2021) [2025] KEHC 9088 (KLR) (Commercial and Tax) (27 June 2025) (Judgment)

Neutral citation: [2025] KEHC 9088 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

COMMERCIAL AND TAX

COMMERCIAL CIVIL SUIT E121 OF 2021

BM MUSYOKI, J

JUNE 27, 2025

BETWEEN

SOLOMON MUTEITHIA KIBIRA ..... APPELLANT

AND

DAPALK CONSORTIUM COMPANY LIMITED ..... DEFENDANT

((Being an appeal from ruling and order in the Chief Magistrate's Court at Milimani Commercial Courts (Hon. Ed(Being an appeal from ruling and order in the Chief Magistrate's Court at Milimani Commercial Courts (Hon. Edgar Kagoni PM) commercial suit number E039 of 2021 dated 16th November 2021)gar Kagoni PM) commercial suit number E039 of 2021 dated 16th November 2021))

JUDGMENT

1. This appeal arises from an order of the trial court dated 16th November 2021 which directed the appellant and one Seth Amusala to appear in court for cross examination. The memorandum of appeal dated 15th December 2021 cites the following grounds;

    1. That the Learned Principal Magistrate erred in law and fact in ruling that his orders that the appellant releases alleged unknown, unidentified and unspecified "tools of trade and materials" allegedly left by the respondent on the appellants property were "clear and unambiguous".

    2. That the Learned Principal Magistrate erred in law and fact in ruling that the respondent had clear notice of the terms of the orders, yet the orders issued by the court on 15th June 2021, did not specify what was to be released to the respondent by the appellant.

3. That the Learned Principal Magistrate erred in law and fact in making partisan orders suo moto that the respondent's advocates cross-examine the appellant and his witness, Seth Amusala yet the appellant never applied for such cross-examination.

4. That the Learned Principal Magistrate erred in law and fact in failing to decided and/or dismiss the application based on the material, affidavit evidence placed before him and in unfairly seeking to have the appellant and Seth Amusala cross-examined by the respondent.

5. That the Learned Principal Magistrate erred in law and fact in failing to acknowledge that the respondent had at the earliest opportunity been granted access to the appellant's property in compliance of the court orders and after dragging its feet for several weeks, had finally visited the appellant's property with its advocates and found no such "tools and materials" on the appellant's property as alleged.

6. That the Learned Principal Magistrate erred in law and fact in unreasonably refusing to acknowledge that the appellant could do no more to comply with his orders issued on 15th June 2021, and that a party should not be unreasonably demanded to do the impossible.

7. That the Learned Principal Magistrate erred in law and in fact in failing to apply proper legal principles regarding contempt of court proceedings thus arriving at a bad decision.

8. That the Learned Principal Magistrate erred in law and fact and has consistently erred in displaying consistent bias against the appellant in the matter since he unilaterally took it over on 31st March, 2021 thereby misapprehending the law, the application thereof and/or the affidavit evidence before him hence arriving at a wrong decision.

2. The ruling being appealed was in respect of application by the respondent dated 24th August 2021 which sought to cite the appellant for contempt of court for disobeying the trial court's injunctive orders dated 15th June 2021. The application was in the following terms;

   a. That this matter be certified as urgent and be heard ex-parte in the first instance.

   b. That this Honourable court be pleased to issue summons to Solomon Muteithia Kibira, the ddefendant herein, to show cause why he should not be punished by this Honourable Court for contempt of court.

   c. That Solomon Mutheithia Kibira, the ddefendant herein be cited in cuntempt of ccourt for wilful disobedience of the ccourt oorders issued by Honourable E. Kagoni on 15th June, 2021.

   d. That the defendant be detained in prison for a period of six (6) months or for a period as this Honourable Court shall deem necessary and/or attachment of the ddefendant's property for being in disobedience of the court orders issued on 15th June 2021.

   e. That costs of this aapplication be borne by the ccontemnor/ddefendant herein.

3. I have looked at the short ruling and it is clear to me that the ruling did not make a conclusive decision in respect of the application dated 24-08-2021. After stating what the application sought and laying down the ingredients for contempt of court orders, the Honourable Magistrate stated as follows;

> 'Having read the various responses in form of affidavits, I find that the above two i.e. whether the terms of the order were clear and unambiguous and whether the defendant had the knowledge of or proper notice of the terms of the order to be not in dispute. The issue is whether the respondent acted against the terms of the said order.

4. However, upon reading the said application and responses, I find that this court cannot adequately determine whether the respondent is in contempt without physical examination of the alleged contemnor and others mentioned in connection with the application. In light of this the court makes the following orders;

    a. Seth Amusala and Solomon Mutethia Kibira are to appear before this court for cross-examination by the applicant on 7-12-2021.

    b. There shall be no orders as to costs.'

5. Noting that the trial court did not make conclusive decision on the guilt or otherwise of the appellant, I hold that the grounds of appeal set out above save for grounds 3 and 4 are premature and unnecessarily seek to interfere with the jurisdiction of the trial court to determine the application. There is no challenge to the competency of the trial court to handle and determine the application to finality and making any orders based on the said grounds would be micro-managing the trial court.

6. The appellant claims that the court should not have made the order for cross- examination as it was not prayed for. According to the applicant, by issuing such orders, the court seemed to be assisting the respondent to fish for evidence from him. He submits that, the court should have decided the application based on the material which had been placed before him. The respondent's submissions dated 9-03-2023 have not addressed this issue. It has concentrated on whether or not contempt of court was proved. As I have held above, the court had not made a determination on whether the appellant was guilty of contempt of court and I will avoid discussing that issue.

7. It is an established legal position that contempt of court is an offence against the court and not the parties. The process is meant to preserve the dignity and authority of the court as an institution and not the ego or personal status of the presiding judicial officer or judge. It serves the purposes of protecting sanctity of court orders and promoting the place of the rule of the law. Without obedience of court orders and respect for authority of the court, the country will be driven into anarchy and chaos thereby destroying the social fabric. It is for this reason that the courts should be firm in upholding the authority of their decision. In Sheila Cassatt Issenberg & another v Antony Machatha Kinyanjui (2021) KEHC 5692 (KLR), Justice E.C. Mwita held that;

> 'The reason why courts punish for contempt is to uphold the dignity and authority of the court, ensure compliance with directions of the court, observance and respect of due process of law, preserve an effective and impartial system of justice, and maintain public confidence in the administration of justice by courts. Without sanctions for contempt, there would be a serious threat to the rule of law and administration of justice. For a party to be cited for contempt, he must have violated and or disobeyed an order that was directed at him.'

8. There is nothing wrong with the court seeking to have clarifications or more information when faced with such an application as much as it should be careful not to turn to be the prosecutor of the application. It still remains the applicant's case and the court must avoid a situation where it would seem to advance the case on behalf of either of the parties but this does not mean that it cannot issue orders suo moto depending on the circumstances of the case.

9. In this case there is no material placed before me that suggests that the trial court was advancing the respondent's case. It is not right for the appellant to allege that the court was assisting a party to the proceedings when it sought to get information from the parties. If indeed the appellant had not committed an act of contempt, he should have nothing to fear in being cross-examined and I see no prejudice that he would suffer in undergoing cross-examination.

10. On the basis of the above, I see no merits in this appeal and the same is dismissed with costs to the respondent.

DATED SIGNED AND DELIVERED AT NAIROBI THIS 27TH DAY OF JUNE 2025.

B.M. MUSYOKI

JUDGE OF THE HIGH COURT.

JUDGMENT DELIVERED IN PRESENCE OF MISS NDERITU FOR THE APPELLANT AND MR. CHITAMBE FOR THE RESPONDENT.