



Huma v Ndung’u & 2 others; Kariuki (Interested Party) (Civil Appeal E157 of 2023) [2024] KEHC 9610 (KLR) (31 May 2024) (Ruling)

Neutral citation: [2024] KEHC 9610 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIAMBU
CIVIL APPEAL E157 OF 2023
DO CHEPKWONY, J
MAY 31, 2024**

BETWEEN

JOHN IRUNGU HUMA APPLICANT

AND

ROBERT KIMANI NDUNG’U 1ST RESPONDENT

**BENARD MURIUKI GATURUKU T/A BENSURE AUCTIONEERS 2ND
RESPONDENT**

**NGURINGA ISHMAEL MURIITHI T/A ISHMAEL & CO
ADVOCATES 3RD RESPONDENT**

AND

MOSES MUIRURI KARIUKI INTERESTED PARTY

RULING

1. Before this court for determination is the Notice of Motion application dated 16th August, 2023 filed under Sections 1A, 1B, 3A and 63, all of the *Civil Procedure Act* and Order 40 Rule 3 of the Civil Procedure Rules. The Application seeks the following orders:
 - a. Spent.
 - b. That this Honourable Court be pleased to issue and order summoning Robert Kimani Ndungu, the Decree Holder and the 1st Respondent herein to personally appear in court and show cause why he should not be punished for contempt.
 - c. That this Honourable Court be pleased to issue and order summoning of Benard Muriuki Gaturuku trading in the name of the 2nd Respondent herein to personally appear in court and show cause why he should not be punished for contempt.



- d. That this Honourable court be pleased to issue an order summoning Nguringa Ishmael Murithi, the managing partner of the 3rd Respondent herein to personally appear in court and show cause why he should not be punished for contempt.
 - e. That upon granting the prayers Nos.(2), (3) and (4) above, this Honourable Court do issue an order directing that Robert Kimani Ndungu, Benard Muriuki Gaturuku and Nguringa Ishmael Muriithi to be committed to civil jail for a period of six months or be punished in such other way as this Honourable Court may deem appropriate for failing to comply with the orders issued on 31st May, 2023 and that they jointly and severally compensate the Judgment Debtor/Applicant for all the losses incurred as a result of their continued defiance of court orders.
 - f. That further, this Honourable Court be pleased to issue an order of prohibitory injunction restraining the Respondents from proceeding and or the completion of sale and transfer of the subject properties being Title number Thika Municipality Block 8/158 and 159.
 - g. That costs of this application be provided for.
2. The Application is based on the grounds as set out in its face and the Supporting Affidavit of John Irungu Huma sworn on 16th August, 2023. According to the Applicant, on 31st May, 2023, this Court issued interim orders staying execution of the Judgment and Decree delivered on 9th May, 2023 vide Thika CMCC No. 114 of 2017, which orders were extended on 19th June, 2021 and 21st July, 2023.
 3. The Applicant holds that despite the interim orders, the Respondent proceeded with the process of sale of the properties known as Thika Municipality Block 8/158 and 159 (hereinafter referred to as “the subject properties”). It is the applicant’s contention that on 14th July, 2023, the subject properties were sold to one Onesmus Muturi Mburu by the Respondents for a sum of Kshs 9,600,000/= which was in blatant defiance of the court orders. The Applicant states that he was only informed of the process of same and execution after the sale had taken place. He has urged the court to punish the Respondents personally or through their representatives for contempt of court and or for them to be summoned in court to show cause why they should not be punished for contempt.
 4. The 1st Respondent opposed the Application through Replying Affidavit sworn on 23rd August, 2023, wherein he has sated that the Applicant is guilty of perjury for lying to court that the application which was dismissed by the court was his. He states that he was not served with the court orders of 30th May, 2023 and neither was his Advocates, hence they did not have knowledge of the same. His argument is that the application is malicious and or meant to scandalize him and thus should be dismissed with costs.
 5. In opposition, the 2nd Respondent filed Replying Affidavit sworn on 24th August, 2023 as a licensed Auctioneer trading as Bensure Auctioneers. He contends that he was instructed by the 3rd Respondent to execute the decree of the court as per the orders granted on 9th May, 2023 so as to realize the decretal sum by way of public auction of the subject properties. He states that as part of due diligence, he perused the trial court file being Thika CMCC No. 114 of 2017 on the same day and proceeded to serve the Appellant with Notification of Sale via Whatsapp on his mobile phone No. 0723063797. That he then advertised the subject properties for the said Public Auction on 27th June, 2023 through the Standard Newspaper. He argues that he was never served with any orders stopping the auction or at all by either the Applicant or interested party. He contends that the public auction was regularly conducted on 14th July, 2023 whereby the subject properties were sold to the highest bidder Onesmus Muturi Mburu. The 2nd Respondent argues that the particulars of contempt have not been set out in



a manner to show contempt on his part and thus the application is an abuse of the court process and should be dismissed.

6. The 3rd Respondent filed a Replying Affidavit which was sworn by Ishmael Muriithi Nguring'a sworn on 24th August, 2023. He averred that there has not been stay of execution of the decree which was delivered in the lower court on 7th February, 2028 and no appeal has been filed. He said that the court orders attached were extracted on 14th August, 2023 and were only served upon him on service of the application, thus he cannot be in contempt of orders that he was not aware of. His argument is that the application has been overtaken by events and contends that the application that was dismissed was not his but that of the Interested Party dated 28th April, 2023 and it was dismissed for want of prosecution which was a negative order and could not be stayed. The 3rd Respondent's argument is that the court order of 30th May, 2023 did not in any way stay execution of the decree of 07th February, 2018 hence this application is a mockery of the court process. He contends that for one to be in contempt of court, the orders must be clear and must have been served upon him which was not the case in this matter. He has therefore urged the court to dismiss the application.
7. The court directed that the Application be canvassed by way of written submissions and the Applicant filed his dated 29th September, 2023, the 1st Respondent's submissions are dated 9th October, 2023, 2nd Respondent's submissions dated 1st November, 2023 and the 3rd Respondent's dated 11th October, 2023 all which the court has read through together with the various authorities cited in support of their positions in consideration of the prayers sought for in the application.
8. Having read through the pleadings, written submissions and cited authorities filed herein by the parties, this Court finds the main issues for determination being:-
 - a. Whether the Respondents are guilty of contempt of court orders issued on 31st May, 2023.
 - b. Whether the Respondents should be ordered to compensate the Judgment Debtor/Applicant for all the issues incurred as a result of their continued defiance of court orders?
9. To determine these issues, this Court reiterates the holding in the Court of Appeal's decision in the case of Shimmers Plaza Limited –vs- National Bank of Kenya Limited [2015] eKLR where it held as follows on contempt proceedings:-

“We reiterate here that court orders must be obeyed. Parties against whom such orders are made cannot be allowed to trash them with impunity. Obedience of Court orders is not optional, rather, it is mandatory and a person does not choose whether to obey a court order or not.....

The courts should not fold their hands in helplessness and watch as their orders are disobeyed with impunity left, right and center. This would amount to abdication of our sacrosanct duty bestowed on us by *the Constitution*. The dignity, and authority of the Court must be protected, and that is why those who flagrantly disobey them must be punished, lest they lead us all to a state of anarchy.”
10. Further in the case of SAD –vs- EOO [2021] eKLR, the court set out the requirements to be satisfied for an application of contempt of court to succeed as follows:-

“In order to succeed on an application for contempt of Court the Applicant must satisfy the court of the following:-



- a. That the terms of the order (or injunction or undertaking) are clear and unambiguous and are binding on the Defendant.
- b) That the Defendant has knowledge of or proper notice of the terms of the order.
- c) The Defendant has acted in breach of the order.
- d) The Defendant's conduct is deliberate.”

(See also the case of Samuel M. N. Mweru, -vs- National Land Commission & 2 Others [2020]eKLR.

11. Having read through the pleadings and submissions filed by the parties herein and find that the Applicant has not advanced or demonstrated any evidence to prove that the Respondents were aware of the court orders to so as to demonstrate that they disobeyed the court orders issued on 31st May, 2023 to warrant the orders sought herein. Also, the court notes that there was no order for stay of execution of the Decree issued on 07th February, 2018 and therefore the Respondents were at liberty to proceed with execution as they did. Further, it has been noted that the dismissal orders given by the court on 9th May, 2023 were in respect of the application of 28th April, 2023 which sought for a dismissal of the suit for want of prosecution. The court agrees with the Respondent that these orders did not stay execution.
12. Therefore, this Court finds that the present application lacks merits and proceeds to dismiss it with costs to the Respondents.

It is so ordered.

RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT KIAMBU THIS 31ST DAY OF MAY , 2024.

D. O. CHEPKWONY

JUDGE

In the presence of:

Mr. Maringa counsel for Applicant/Appellant

Mr. Tumu holding brief for Mr. Nguringa counsel for 1st Respondent

Mr. Tumu counsel for 3rd Respondent

Court Assistant - Martin

