



**Itewa v Baraka Credit Limited & another (Civil Appeal  
E084 of 2023) [2024] KEHC 3181 (KLR) (20 March 2024) (Ruling)**

Neutral citation: [2024] KEHC 3181 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MERU  
CIVIL APPEAL E084 OF 2023  
EM MURIITHI, J  
MARCH 20, 2024**

**BETWEEN**

**ZABLON MATHENGE ITEWA ..... APPLICANT**

**AND**

**BARAKA CREDIT LIMITED ..... 1<sup>ST</sup> RESPONDENT**

**ANFIELD AUCTIONEERS ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

**The 1st Application**

1. By a notice of motion under certificate of urgency dated 31/5/2023, the Appellant/Applicant seeks:
  1. Spent
  2. Spent
  3. That a Temporary Injunction be issued restraining the Respondents their agents, and/or servants from attaching the Appellant's/Applicant's property namely Motor Vehicles Registration Number KCA 485 S and KBP 094 Y pending the hearing and determination of the instant appeal.
  4. That cost be in the cause.
2. The application is premised on the grounds on the face of it and supported by an affidavit sworn by the Applicant on even date. He urges that the trial court erroneously dismissed his suit without appreciating that the delay in prosecuting it had been substantially explained. He demonstrated to the court that the matter had not abated because they had been negotiating, and the dismissal of the suit deprived him of his right to be heard. He is advised by his advocate that dismissal of a suit should be



applied sparingly to ensure every party is heard, and unless the orders sought are granted, the entire appeal, which has high chances of success, will be rendered nugatory.

3. There was no response to this application.

### **The 2<sup>nd</sup> Application**

4. By a notice of motion under certificate of urgency dated 21/7/2023, the Applicant seeks:
  1. Spent
  2. That Honourable Court do commit the agents, servants and/or employees of the 2<sup>nd</sup> defendant to civil jail for being in contempt of the Court orders issued on 30/06/2023.
  3. That in the alternative of the above the agents, servants and/or employees of the 1<sup>st</sup> and 2<sup>nd</sup> respondents be ordered to purge contempt and return the Motor Vehicle Registration Number KCA 485 S to the residence of the Appellant/applicant in Maua area.
  4. That cost of the application be borne by the respondents.
5. The application is premised on the grounds that despite having been served with the status quo orders of 30/6/2023, the Respondents on 7/7/2023, with an order from Milimani Commercial Court Civil Case No E0894/2023 issued on 13/7/2023 descended in the Applicant's home and illegally and unlawfully repossessed the motor vehicle. He accuses the applicant in the Milimani case of failing to disclose the existence of Githongo SPMCC No E005/2023 and this appeal.
6. The Applicant swore a supplementary affidavit on 2/10/2023 in support of his application.
7. The 1<sup>st</sup> Respondent opposed the application vide a replying affidavit sworn by Stephen Kaleria Kanake, one of its directors on 25/9/2023. He avers that they were neither served with the court orders of 6/6/2023 nor the hearing notice of 19/6/2023. Following the dismissal of the lower court suit, the 1<sup>st</sup> Respondent instructed the 2<sup>nd</sup> Respondent to repossess the vehicles on 23/5/2023 way before this appeal was filed, and thus there were no court orders stopping the same. Had the Applicant served the court order of 6/6/2023 upon the 2<sup>nd</sup> Respondent in good time, then they could not have proceeded to cart away the vehicles. The 1<sup>st</sup> Respondent was unaware of the steps the 2<sup>nd</sup> Respondent had taken in the exercise of their mandate as provided under the *Auctioneers Act*. He denies disobedience of the court orders on the part of the 1<sup>st</sup> Respondent, and accuses the Applicant of always misusing court orders in order to evade servicing his loan. He urges the court to order the Applicant to either pay the sum of Kshs 7,870,000 to the 1<sup>st</sup> Respondent or deposit the same in court for the vehicles to be released. He is apprehensive that if the vehicles are released to the Applicant, who has proven to be untrustworthy by removing the tracking devices therein, without any stringent condition, he is likely to interfere with and/or waste them to the detriment and prejudice of the 1<sup>st</sup> Respondent. In view therefore, the application lacks merits, is frivolous, vexatious and it should be dismissed with costs.

### **Submissions**

8. The Applicant invites the court to honour the obligation to punish the Respondent for contempt, and cites *Clonet Wireless Kenya Limited v Minister for Information of Kenya Authority* (2005) eKLR. He accuses the Respondents of non-disclosure of material facts and urges that to visit another court on matters ongoing before another court is nothing but abuse of court, and should not be entertained.
9. The 1<sup>st</sup> Respondent cites *North Tetu Farmers Co. Ltd v Joseph Nderitu Wanjobi* (2016) eKLR where the judge (Mativo J as he then was) opined that, "The power to commit for contempt is one to be



exercised with great care. An order committing a person to prison for contempt is to be adopted only as a last resort.” It urges that courts have taken the position that the power to punish for contempt is a discretionary one and should be used sparingly, and cites *Gatharia K. Mutikika v Baharini Farm Limited* (1985) KLR 227 and *Carey v Laiken* 2015 SCC 17. It accuses the Applicant of coming to court with unclean hands, because he has failed to service the loan advanced to him, and cites *Maithya v Housing Finance of Kenya (K) Ltd* (2003) EA 133.

### Analysis and Determination

10. The issues for determination are whether the threshold for the issuance of the orders sought in the applications has been met.

### Temporary Injunction

11. This court in *Julius Musili Kyunga v Kenya Commercial Bank Limited & another* [2012] eKLR held that:

- “(8) This court had opportunity to consider the issue of the principles for the grant of injunction pending appeal in a ruling on Preliminary Objection in Mombasa HCCC 235 of 2010 *D.J. Lowe & Co. Ltd v Credit Agricole Indosuez & 3 others* of 20<sup>th</sup> February 2012 where I said as follows: “Although Order 42 rule 6 of the *Civil Procedure Rules* does not expressly provide for application for injunction pending appeal the same is, in accordance with the authorities, part of the body of common law, doctrines of Equity and procedure and practice of Courts of Justice in England as incorporated in Kenya by virtue of section 3 (1) of the *Judicature Act*, Cap. 8 Laws of Kenya, and in the absence of express procedure rules, the inherent jurisdiction of the Court under Section 3A of the *Civil Procedure Act* provides a basis for applications for injunction pending appeal in accordance with principles set out in relevant case law authorities. Indeed, the Court of Appeal of Kenya has adopted the principles in *Erinford Properties* in many cases notably the *Bhutt v Rent Restriction Tribunal* CACA No 6 of 1979 and *Madhupaper International Ltd v Paddy Kerr* (1985) KLR 840. The Court of Appeal Rules do however provide for injunction pending appeal under Rule 5 (2) (b) of the Rules.”
- (9) The object of the injunction pending appeal is to preserve the subject matter to ensure that the appeal, if successful, will not be rendered nugatory. As I noted in the above ruling: “Of course, the discretion to grant an injunction pending appeal must be exercised judicially and carefully in the light of the circumstances of each case. As Meggary, J. in *Erinford Properties* noted, there will be cases where it will be wrong to grant an injunction pending appeal “as where any appeal would be frivolous, or to grant the injunction would inflict greater hardship than it would avoid, and so on” and when damages would be a suitable alternative.”
- (10) In considering the principles for the grant of injunction pending appeal, the Court of Appeal has developed the tests that the appeal must not be frivolous, or the applicant must show that he has an arguable appeal, and that the appeal, if successful, should not be rendered nugatory. See *Madhupaper v Paddy Kerr* and *Githunguri v Jimba Credit*, supra. Although the jurisdictions of the trial court and the appellate court are concurrent, the High Court being



required to exercise its own jurisdiction (see Madhupaper case) and the Court of Appeal being required to assess denovo the suitability of grant of the relief (see Githunguri case) the emphasis to be placed by each court on each of the two tests of arguable appeal and nugatory appeal is, in my view, different. While both the trial court and the appellate court must consider in equal weighting the question whether the appeal would, if successful, be rendered nugatory, the trial court must defer to the decision of the Court of Appeal with respect to the existence of an arguable appeal because the former court cannot be expected to sit an appeal from its own decision. So that at the trial court level the principle should be considered, that as held in *Bhutt v Rent Restriction Tribunal CACA No 6 of 1979*, where a party is exercising its undoubted right of appeal, the court ought to ensure that the appeal, if successful, would not be rendered nugatory. For both the trial and the appellate courts, it would be useful to demonstrate an arguable appeal or serious questions for investigation on appeal through a draft Memorandum of Appeal...(12) As regards the rendering of the appeal nugatory, I would agree with the majority of the Court of Appeal decisions as cited by the Applicant that in matters of land, it is usual to grant injunctions and as held in *Githunguri's case, supra* "if the charged premises were sold during the pendency of the proceedings, the whole object of the suit and the intermediate appeal would be defeated."

12. What constitutes a prima facie case was explained by the Court of Appeal in *Mrao Ltd v First American Bank of Kenya Limited and 2 others* [2003] eKLR as follows:

"A case in which on the material presented to the Court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party to call for an explanation or rebuttal from the latter."

13. It is apparent that a prima facie case is easily discernable from the pleadings and the onus of proving its existence is on the Applicant.
14. The Applicant has pleaded that if the injunctive orders sought are not granted, he will suffer irreparable loss and his highly successful appeal will be rendered nugatory. The 1<sup>st</sup> Respondent laments that the Applicant has continuously defaulted on the repayment of his loan, and he is hoodwinking the court to grant undeserved orders. The 1<sup>st</sup> Respondent has acknowledged that at the time of the repossession of the motor vehicles, there was no court order to the contrary.
15. It is said that the 2<sup>nd</sup> Respondent obtained an order from Milimani Commercial Court Civil Case No E0894/2023 on 13/6/2023, on the basis of which the motor vehicles were repossessed. The 2<sup>nd</sup> Respondent's procurement of the said order while this court was actively seized of this matter is an abuse of the court process.
16. This court is alive to the fact that the intended appeal stems from an order dismissing the Applicant's suit for want of prosecution. That is a negative order which courts have ordinarily refrained from granting stay of execution. But what the Applicant seeks is not stay of execution but a temporary injunction. The Court of Appeal *In Re Estate of Harish Chandra Hindocha (Deceased)* [2021] eKLR had this to say on the subject,

"...There is also a prayer for an injunction which is not barred by the sheer presence of a negative order."



17. The 1<sup>st</sup> Respondent's real apprehension, that the Applicant will waste and/or interfere with the motor vehicles in the event of their release to him, cannot be overlooked.
18. In order to preserve the substratum of the intended appeal, this court deems it fit to grant an order for the maintenance of the prevailing status quo pending the hearing and determination of the intended appeal.

### Contempt of Court

19. The Court (John M. Mativo J. as he then was) in *Samuel M. N. Mweru & others v National Land Commission & 2 others* [2020] eKLR discussed in depth the applicable law on contempt of court as follows:

“It is an established principle of law that in order to succeed in civil contempt proceedings, the applicant has to prove (i) The terms of the order, (ii) Knowledge of these terms by the Respondent, (iii) Failure by the Respondent to comply with the terms of the order.”

20. The court in the aforementioned case proceeded to quote with approval the learned authors of the book; *Contempt in Modern New Zealand* thus:

“There are essentially four elements that must be proved to make the case for civil contempt. The applicant must prove to the required standard (in civil contempt cases which is higher than civil cases) that:-

- a) The terms of the order (or injunction or undertaking) were clear and unambiguous and were binding on the defendant;
- b) The defendant had knowledge of or proper notice of the terms of the order;
- c) The defendant has acted in breach of the terms of the order; and
- d) The defendant's conduct was deliberate.”

21. On 6/6/2023, the court issued the following directions,

“1. Upon reading the Notice of Motion/Summons dated 31/5/2023, the Court certified the application as urgent in view of the reliefs sought. 2. The application shall be served for hearing/directions on the 19<sup>th</sup> June 2023 at 10.00 am. 3. In the meantime, the Court orders that the status quo be maintained in terms of prayer No 2 of the Notice of Motion for fourteen (14) days only.”

22. It appears from the record that the Respondents' counsel's non-attendance on 19<sup>th</sup> of June 2023, when the application was scheduled for interpartes hearing was due to non-service. The record is clear that when the matter came up for hearing on 30/6/2023, the 1<sup>st</sup> Respondent's counsel was present and the interim orders were extended. The affidavit of service dated 29/6/2023 shows that on 20/6/2023, the 1<sup>st</sup> Respondent's counsel was served with a mention notice, the court order issued on 6/6/2023, the application dated 31/5/2023 and the memorandum of appeal dated 31/5/2023.



23. Unknown to the Applicant, the 2<sup>nd</sup> Respondent had filed Milimani CMCC No E894/2023 where it obtained the orders of 13/6/2023 in the following terms;

“ 1. That orders authorizing the Officer Commanding Station Meru Police Station or any of his officers in the rank of Inspector be and is hereby directed to accompany Martin N. Mwanikit/aAnfield Auctioneer during entry and repossession motor vehicles registration No KCA 485 S & KBP 094 Y which are currently parked at the debtor’s residence in Marua area next to Mwiriama FM station, Meru. 2. That this order is purposely for carting away the proclaimed motor vehicles.”

24. This court finds that the Respondents did not willfully fail and/or neglect to obey the court orders of 6/6/2023, because they had no knowledge thereof. How then can they be found to have been in contempt? The Respondents became aware of the existence of the orders of 6/6/2023 on 30/6/2023 long after the motor vehicles had been repossessed on the strength of the orders issued in Milimani CMCC No E894/2023.

### **Orders**

25. Accordingly, for the reasons set out above, this court does not find merit in the application dated 27<sup>th</sup> July 2023, and it is dismissed.

26. In the interest of justice, however, this court orders that the status quo prevailing as at the time of this ruling shall be maintained pending the hearing and determination of the intended appeal.

27. Costs shall abide the outcome of the appeal.

Order accordingly.

**DATED AND DELIVERED THIS 20<sup>TH</sup> DAY OF MARCH, 2024.**

**EDWARD M. MURIITHI**

**JUDGE**

Appearances:

Mr. J. Mwititi for the Plaintiff/Applicant.

Mr. Ayieko for 1<sup>st</sup> Defendant.

N/A for the 2<sup>nd</sup> Defendant.

