



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MAKUENI

HC MISC CIVIL APPL. NO. 110 OF 2018

CHINA ROAD & BRIDGE CORPORATION.....APPLICANT

VERSUS

ERNEST MUHAYA BENJAMIN.....RESPONDENT

RULING

1. By Notice of Motion dated 19/02/2018 the Applicant seeks orders;

1) ***That*** the Application herein be certified urgent, heard *ex-parte* in the first instance and service thereof be dispensed with in the first instance.

2) ***That*** this Honourable Court be pleased to grant a stay of execution of decree and warrants of attachment obtained subsequent hereto in MAKINDU SPMCC NO. 403 OF 2016, ERNEST MUHAYA BENJAMIN –VS- CHINA ROAD & BRIDGE CORPORATION pending the hearing and determination of this Application *inter party*.

3) ***That*** this Honourable Court be pleased to issue a temporary injunction as against the Respondents, its agents and/or servants specifically M/S NDUTUMI AUCTIONEERS from advertising, selling or in any manner whatsoever waste away motor vehicle registration number KCG 254Y SHACKMAN TRUCK as taken away from the Applicant pending hearing and determination of this Application *inter-party*.

4) ***That*** this Honourable Court do order the return of the Applicant's vehicle as taken away by M/S NDUTUMI AUCTIONEERS being motor vehicle registration number KCG 254Y.

5) ***That*** this Honourable Court be pleased to stay proceedings in MAKINDU SPMCC NO. 403 OF 2016, ERNEST MUHAYA BENJAMIN –VS- CHINA ROAD & BRIDGE CORPORATION pending the hearing and determination of this Application *inter party*.

6) ***That*** this Honourable Court do set aside judgment as entered in MAKINDU SPMCC NO. 403 OF 2016, ERNEST MUHAYA BENJAMIN –VS- CHINA ROAD & BRIDGE CORPORATION.

7) ***That*** this Honourable Court be pleased to issue an order directing Makindu Senior Principal Magistrates Court to hear MAKINDU SPMCC NO. 403 OF 2016, ERNEST MUHAYA BENJAMIN –VS- CHINA ROAD & BRIDGE CORPORATION on its merits upon the Applicant filing its defence.

8) ***That*** this Honourable Court be pleased to issue any further and appropriate orders as the court may deem just and expedite.

9) ***That*** costs of this application be provided for.

2. The same is supported by the grounds on the face of the motion and an Affidavit sworn by Faug Guocheng on 19/10/2018.

3. The same opposed via Affidavit sworn by Ernest Muhanya Benjamin on 24/10/2018.

4. The parties agreed to canvass same via submissions which they filed and exchanged.

ISSUES:

5. I have gone through the record, materials before me and the parties' submissions on record, and I find the issues are; ***whether this court can set aside exparte-judgment as entered in MAKINDU SPMCC NO. 403 OF 2016, ERNEST MUHAYA BENJAMIN –VS- CHINA ROAD & BRIDGE CORPORATION, and whether this Court can issue an order directing Makindu Senior Principal Magistrates Court to hear MAKINDU SPMCC NO. 403 OF 2016, ERNEST MUHAYA BENJAMIN –VS- CHINA ROAD & BRIDGE CORPORATION on its merits upon the Applicant filing its defence and finally, What is the order as to costs?***

6. Order 10, Rule 11 of Civil Procedure Rules:

“provides that where judgment has been entered under this Order the court may set aside or vary such judgment and any consequential decree or order upon such terms as are just.”

7. This provision applies in the matter before the trial court not in another higher court. The High court jurisdiction can only be invoked to set aside /review and or vary lower court orders via either judicial review, constitutional application and or an appeal.

8. There are no civil procedure provisions for revision in the same fashion as set out in the criminal procedure code cap 75 LOK.

9. The locus classicus on jurisdiction is the celebrated case of **OWNERS OF THE MOTOR VESSEL “LILLIAN S” V CALTEX OIL (KENYA) LTD [1989] KLR 1** where Justice Nyarangi of the Court of Appeal held as follows

'I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.'

10. The authority for this holding by the learned Judge of Appeal is to be found in the writings of John Beecroft Saunders in a treatise which is no longer published headed **Words and Phrases Legally defined – Volume 3: I – N** and it states at page 113 the following about jurisdiction:-

“By jurisdiction is meant the authority which a court has to decide matters that are litigated before it or to take cognisance of matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter, or commission under which the court is constituted, and may be extended or restricted by the like means. If no restriction or limit is imposed the jurisdiction is said to be unlimited. A limitation may be either as to the kind and nature of the actions and matters of which the particular court has cognisance, or as to the area over which the jurisdiction shall extend, or it may partake of both these characteristics. If the jurisdiction of an inferior court or tribunal (including an arbitrator) depends on the existence of a particular state of facts, the court or tribunal must inquire into the existence of the facts in order to decide whether it has jurisdiction; but, except where the court or tribunal has been given power to determine conclusively whether the facts exist. Where a court takes it upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgment is given.

11. Clearly, if this Court lacks jurisdiction the matter will be at an end as I will have to down my tools and take no further step.

12. In absence of the applicant following the procedure stated above, the court cannot be said to have jurisdiction and thus has to down its tool without any more step. Thus the court make the following orders ;

i. The application is incompetent and hereby struck out with costs assessed at Ksh 20,000 to the respondent.

ii. The applicant is at liberty to get back Ksh 300,000 deposited in courts.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT MAKUENI THIS 31ST DAY OF MAY, 2019.

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C. KARIUKI

JUDGE