REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL APPEAL NO. 21 OF 2017

JAMII BORA BANK LTD…….APPELLANT

VERSUS

SAMUEL ODOYO ORWA.....RESPONDENT

J U D G M E N T

1. By a plaint dated the 27/10/2016 filed at the Chief Magistrate Court, the Respondent sued the current appellant and one Charles Owino Omondi Omondi and sought various orders among them a declaration that the said Charles Owino Omondi was not the lawful owner of motor vehicle Registration No. KBH 629H when he used the title thereto to secure financial accommodation from the Appellant; an Order that the motor vehicle be discharge and transferred to the Respondent and an order for injunction and in the alternative special damages of Kshs.150,000/= and general damages.

2. Simultaneously filed with the plaint was a Notice of Motion dated the same day and seeking orders among them an interim injunction restraining repossession, detention, sale or any other dealing with the suit motor vehicle pending the hearing and determination of the application and a temporary injunction on the same terms pending hearing and determination of the suit.

3. When the application was placed before the trial court under certificate of urgency and in the absence of the parties, the same was certified urgent and ordered to be served for *interpartes* hearing some 10 days later. When the matter came back in court as ordered, the three parties were duly represented by advocates. Mr. Kingori for the 2nd Appellant sought time to file responses stating that he had just been instructed. A Similar application was made by Ms. Amarshi who appeared for the said Charles Owino Omondi.

4. Mr. Wachira for the Respondent, plaintiff then, informed the court that there was an agreement between the plaintiff (now Respondent) and the 2nd defendant (now Appellant) to grant prayer b of the application a position that was readily confirmed by Mr. Kingori. Among other orders, and directions the court granted the desires of the parties by granting prayer (b) in the Notice of Motion.

5. Some eleven (11) days later the Appellant herein filed an application under Certificate of Urgency and prayed among other orders that the Orders of 10/11/2016 be set aside or varied on its terms and that the plaintiff/respondent be restrained from repossessing or selling or in any other manner interfering with the suit motor vehicle. The grounds upon which the application was made were that the court confirmed the prayer for b and that the Respondent then wrote to the Appellant enclosing the court order which the Appellant contended was vague and amenable to more than one interpretation and that the order as prayed

for an extracted did not entitle the Respondent to possession of the suit motor vehicle that application was expressed to be founded upon the provisions of section 1A, 1B, 3A as well as 63 and Order 10 Rule 11 and Order 22 Rule 22(1)(3) as well as unspecified provisions of Order 40. The same application was vigorously opposed by the current respondent by a Replying Affidavit sworn by the Respondence whose gist was that the Order sought to be set aside was a consent Order which was not alleged to be illegal and that being registered in the Appellants name the Respondent only, by virtue of the order, had the right to possess and sue the motor vehicle and for the discloses that the vehicle had been repossess thrice and everytime the auctioneer was able to trace it and that the vehicle was released to him as an exhibit in Mombasa CR Case No. 1361 of 2016. Lastly the Responded aversed that on repossession he had his employer's equipment in the car and he was denied the right to take the same out of the car.

6. The trial court did consider the application and by a ruling dated the 27/1/2017 had the same dismissed on the following terms:-

> **"Further, the Orders consented to by the parties herein on 10th November 2016 cannot be said to be vague and ambiguous as submitted by the 2nd defendant. They are in my opinion clear on the face of it and not open to any misinterpretation.**
>
> **In the circumstances, I find the second defendant's application dated 21st November 2016 devoid of merit and proceed to dismiss the same with costs to the plaintiff. And since the 2nd defendant failed to obey the said orders, I direct that the same be obeyed first before any further Orders are granted. Once done, I direct that the status quo be maintained until the hearing and determination of the suit herein or until further orders are granted".**

7. In coming to that conclusion the trial court did, it consider all the relevant principles of setting aside a consent order. He indeed did consider and took into account the binding decisions of the court which are to this court expound and enunciate the undeniable position of the law. Indeed it would have been a different thing had the consent been challenged on account of mistake or lack of instructions on Mr. Kingori Advocate. In short no vitiating factor as to be sufficient to vitiate a contract was ever alleged or proved before the trial court.

8. Now the appellant has come before this court to challenge the decision on grounds that the order as prayed for granted and extracted was vague and not clear. It would indeed be true that the order is not clear as the plaintiff while approaching the court did so as if the motor vehicle was merely under threat of repossession by reading paragraph 16 of the Respondents affidavit in support of the application for injunction. When the parties appeared before the trial court on 11/10/2010 and recorded the consent none of the parties bothered to tell the court the whereabouts of the motor vehicle. One would say that it was reckless and an abdication of duty to the court to act in the manner the advocates did just as much as it was a sign of in sufficient application of selves to grant their consent in a manner bereft of ambiguities.

9. As sought, granted and extracted the order is capable of interpretation that the Appellant was restricted from repossessing the suit motor vehicle. Surety that is an order the cour would not have issued if there was to be evidence that the vehicle had been repossessed prior to the order being granted. The same order may also reasonably be interpreted to command the Appellant not to detain or sell the motor vehicle. This interpretation would mean that the vehicle was already in the hands of the appellant and the Respondent needed the vehicle, being the subject matter of the litigation to be preserved pending the determination of the application. In both scenarios, to this court, no interpretation was evident that the Appellant was compelled to release the motor vehicle to the Respondent forthwith as demanded by the Respondent in their letter of 16/11/2016.

10. The happenings in this appeal underscores the need of the parties and their counsel to be forthright and candid with the court by full disclosure of all material facts so that the decision by the court, even if it be with the sanction of the parties' consent is made self-evident and explanatory.

11. In this duty to court both counsel failed and they deserve no commendation at all. The order that was issued and sought to be set aside was indeed ambiguous and capable of more than interpretation and it

was therefore a valid complaint by the appellant and the trial court was to the extent not right to have held that it was clear on the face of it.

12. That however is not to say that the trial court made any error on the substantive matter placed before it for determination. The issue for determination was whether or not there was a vitiating factor disclosed to justify the court to upset a consent between the parties. I hold and find that lack of clarity in a court order is not a ground to set it aside but a ground to seek interpretation or clarification. That is what the Appellant ought to have sought and that clarification needed not to have come from court solely. It was expected that the Appellant should have sought to know from its counsel what he meant when he recorded the consent. Alternatively there ought to have been an affidavit by Mr. Kingori Advocate giving an insight on what negotiations yielded the consent being recorded by the court.

13. However, this being a first appeal, the matter proceed by way of a retrial. The court shoulders the duty the trial court shouldered.

14. As the application invoked the inherent powers of the court which is to do justice and avoid the abuse of court process, and taking into account that the matter was not concluded on the question whether or not the Appellants title was validly acquired and the fact that the Respondent had in own affidavit sworn on 30/11/2017 adverted to having paid the sum of Kshs.100,000/= to have the vehicle released previously, when complied with the glaring multiple possible meanings of the order, the court ought to have found a middle ground to protect the competing interests. In the Replying affidavit of the Respondent sworn on the 30/11/2016 at paragraph 5(h) the Respondent had given an offer which this court finds to have been very reasonable. In the paragraph the Respondent said:-

> **"In the loan approval form the vehicle is valued by the 2nd Defendant at Kshs.600,000 loan advanced was Ksh.250,000.**
>
> **I have already paid Kshs.100,000 of that loan. The vehicle is being stored somewhere in a garage gathering dust and getting wasted as it accumulates storage charges. The bank is not benefiting in any way by having the vehicle stored somewhere. The vehicle is better off with me because, I will maintain it and keep it in proper condition as I have been doing and storage charges will be avoided. The bank need not worry about me being in possession of the vehicle on account of reasons already given above".**

15. I find that there was no reason to vitiate the consent order but there was a reason for the interest of the justice of the matter between the parties to vary the order so that the vehicle is released to the Respondent on terms that the advocate for the Respondent gives an irrevocable undertaking to the Appellant that the vehicle would not be alienated, would be comprehensively insured by a reputable Insurance Company to its current market value pending the hearing and determination of the suit. That is what meaning I give to the Respondents depositions quoted above.

16. As this order substantially compromises the application dated 31/10/2016, and as was directed by the trial court, that application need not be heard but the suit be fast tracked.

17. The upshot is that I allow the appeal to the limited extent that the order of the trial court dated 27/1/2017 is varied to the effect that the motor vehicle be released to the Respondent upon its advocate giving a suitable undertaking. The release be done within 3 days from the date the undertaking is received by the Appellants advocate.

18. If however, that shall be delay in setting the terms of the undertaking, let the Respondent be given his equipment said to be in the car forthwith.

19. As much as the Appeal appears to have succeeded partly, the same was occasioned by less attention to detail by the advocates to the parties and for which reason I order that each party shall bear own costs.

Dated and delivered at **Mombasa** this **31st** day of **March 2017**.

HON. P. J. O. OTIENO

JUDGE

In the presence of:-

Mr. Wachira for the Respondent

Mr. Odongo for Obinju for the Appellant.

Hon. Justice P. J. O. Otieno J

31/3/2017