



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CIVIL APPEAL NO. 572 OF 2012**

**GLORY RENT A CAR LIMITED..... APPELLANT**

**V E R S U S**

**ZEPHANIAH MBURKI AMURI..... 1<sup>ST</sup> RESPONDENT**

**WILSON M. KARIUKI**

**T/A WISKAM AUCTIONEERS..... 2<sup>ND</sup> RESPONDENT**

**RULING**

1. The subject matter of this ruling is the motion dated 13<sup>th</sup> August 2013 and amended on 25.11.2014 in which **Glory Rent a Car Ltd**, the appellant herein, sought the following orders:
  1. ***THAT this honourable court be pealed to commit for contempt WILSONM. KARIUKI T/A WISKAM AUCTIONEERS and advocates DUNSTAN MUTUKU WAMBUA and B. M. MBAI for having disobeyed the orders of the court given on 5<sup>th</sup> November 2012 which orders were given in the presence of both parties.***
  2. ***The contemnors be committed to civil jail for a period not exceeding six (6) months in the alternative the property of the contemnors be sequestered as a consequence.***
  3. ***THAT the costs of this application be provided for.***
2. The motion is supported by the affidavits of kelvin Mogeni. It is the submission of the applicant that on 7<sup>th</sup> November 2012, Mr. Justice Onyancha issued an order staying the execution of the decree issued by the trial court pursuant to the motion dated 30.10.2012. The order was to last upto 12<sup>th</sup> November 2012. The aforesaid orders were extended suo moto by Lady justice Ougo to pend for a further 14 days on 12.11.2012. On 26.11.2012, the appellant was directed to deposit in court the decretal sum as a condition for the stay. The appellant complied with the directive on 3<sup>rd</sup> December 2012. It is submitted that on 7<sup>th</sup> December 2012 this court issued an order directing motor vehicle registration no. KBH 898Y to be immediately released to the appellant. It is the averment of Mr. Mogeni that he was shocked to learn that through the letter dated 13<sup>th</sup> December 2012 from B. Mbai Associates that the aforesaid motor vehicle had been sold by **Wiskam Auctioneers** despite the existence of a court order staying execution of the decree. Mr. Mogeni further averred that his inquiries revealed that Wiskam Auctioneers had advertised for sale the aforesaid motor vehicle on 8<sup>th</sup> November 2012 and had the same sold on 16.11.2012. The appellant have urged this court to find the respondents guilty for contempt and to proceed to punish them.

3. The respondents on the other hand filed the replying affidavits of Bernard M. Mbai and that of Dunstan Mutuku Wambua to oppose the motion. Mr. B. Mbai in his affidavit denied having personally attended court over this matter on 26.11.2012 and 3.12.2012. He also denied that he was served with the court order which is alleged to have been breached. It is also argued that the order for stay had not been extracted as of 12<sup>th</sup> November 2012 hence the same could not have been served upon the respondents. In the affidavit of Dustan Mutuku Wambua, it is averred that by a letter dated 6<sup>th</sup> November 2012 the respondent was notified of the existence of an order for stay of execution meant to last upto 12.11.2012. The aforesaid letter was copied to the Wiskam Auctioneers. It is stated that Wiskam Auctioneers had booked space for the advertisement of the sale of the motor vehicle before they were served with the stay order. The auctioneer was eventually served with the order on 8.11.2012. The respondents argued that the order served was without the penal notice. Mr. Dunstan Wambua admits that he informed Wiskam Auctioneers that he was not aware that the order for stay was extended and proceeded to instruct the auctioneers to sell the property. It is the respondent's argument since the extended order was not extracted nor served, no breach could arise
  
4. I have carefully considered the rival written submissions plus the grounds stated on the face of the motion and the facts deponed in the supporting and replying affidavits. There is no dispute that the respondents were aware of the existence of the order for stay of execution of the decree. The same was clear in its terms the execution had been stayed. What the respondents have done particularly Mr. Dunstan Mutuku Wambua is to take upon himself to interpret that there was no extension of the interim order, since the extended order of stay had not been extracted and served upon him. In my humble view that was a very dangerous presumption. A diligent counsel would first cross-check with the court file to confirm whether or not the orders were extended. It cannot lie in the mouth of the learned advocate to state that the order did not have a penal notice. I have already stated that the order was clear in its terms and as an officer of this court the learned advocate ought to know the consequences of defying the court order whether the order had a penal notice or not. I find Mr. Dunstan Mutuku Wambua guilty for contempt. I am however convinced that Mr. B. M. Mbai did not play any role in this saga. I find him not guilty for contempt.
  
5. Mr. Wilson M. Kariuki T/A Wiskam Auctioneers has admitted knowledge of the existence of the court order staying the execution of the decree. In fact he admitted that he was served with the order when he had already given instruction to the Star newspaper to advertise for sale of motor vehicle registration no. KBH 898Y.
  
6. Mr. Wilson Kariuki gave a detailed explanation on the steps he took before proceeding to sell the aforesaid motor vehicle. It is clear to me that the auctioneer applied due diligence by seeking the advice from the decree holder's advocates. Mr. Dunstan Mutuku Wambua advised the auctioneer to proceed and sell the attached goods. Again, I find the auctioneer not guilty for contempt.
  
7. Having convicted Mr. Dunstan Mutuku Wambua for contempt, it is now upon him to submit on mitigation before this court renders its decision on sentence.

Dated, Signed and Delivered in open court this 13<sup>th</sup> day of May, 2016

**J. K. SERGON**

**JUDGE**

In the presence of:

..... for the Applicant

..... for the Respondent