



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI (NAIROBI LAW COURTS)**

**Civil Appeal 122 of 2007**

NICHOLAS MAHIHU MURIITHI.....APPELLANT

VERSUS

CONSOLIDATED BANK OF KENYA LTD.....1<sup>ST</sup> APPLICANT

DIKEMWA ENTERPRISES LIMITED.....2<sup>ND</sup> APPLICANT

**R U L I N G**

1. Before me is a notice of motion brought by Consolidated Bank of Kenya Ltd and Dikemwa Enterprises Ltd (hereinafter referred to as the applicants). The applicants who are the respondents to this appeal, have moved this court under Section 3A and 63(e) of the Civil Procedure Act for orders *inter alia* to discharge and or set aside the order of this court issued on 16<sup>th</sup> May, 2008. The applicants further seek an order that motor vehicle Registration No.KAU 569G be sold and proceeds realized deposited in a joint interest earning account in the names of the advocates for the parties.

2. The orders sought to be reviewed, were issued at the request of Nicholas Mahihu Muriithi the appellant to this appeal (hereinafter referred to as the appellant). The appellant had filed a suit in the lower court against the applicants, claiming that the attachment and threatened auction of motor vehicle KAU 569G was unlawful and void, and sought an injunction restraining the applicants from selling or otherwise parting with possession of the said vehicle.

3. Following a preliminary objection to the suit raised by the applicants' counsel, the trial magistrate upheld the preliminary objection and dismissed the appellant's suit. The appellant lodged the current appeal against the order dismissing his suit and further obtained an order restraining the applicants from advertising, offering for sale, transferring or otherwise parting with possession of the motor vehicle KAU 569G pending the hearing and determination of the intended appeal. The applicants now want the order of 16<sup>th</sup> May, 2008 discharged and or set aside, on the grounds that the appellant has taken no action to have his appeal heard although it is more than 16 months since the orders were given.

4. The applicants maintain that the subject vehicle is depreciating in value since it is exposed to the elements of weather. The motor vehicle is also attracting daily storage charges of Kshs.250/=. The applicants therefore maintain that there is a real danger that they may lose out on the security. Therefore it is in the interest of both parties that the motor vehicle be sold and the proceeds of sale invested in a joint interest earning account. The case of *Wanguhu vs Kang'ia [1987] KLR 51*, was cited for the proposition that the court has inherent powers to control its process for the ends of justice to be met.

5. The application was opposed through a replying affidavit sworn by Nicholas Mahihu Muriithi. The appellant maintain that the applicants' motion was incompetent and ought to be struck out as there is no jurisdiction to grant the prayers sought. It was further contended that the outstanding amount in respect of which the motor vehicle was repossessed is in dispute. The appellant maintains that he has severally requested the 1<sup>st</sup> applicant to provide him with proper and correct account, and the 2<sup>nd</sup> applicant to provide him with the repossession charges, all of which he has offered to pay, but the applicants have failed to comply. The appellant maintains that the applicant intend to sell his vehicle at a throwaway price. The court was therefore urged to dismiss the application.

6. I have carefully considered the application before me. I find that the appellant's motor vehicle registration No.KAU 569G was repossessed by the 1<sup>st</sup> applicant through the 2<sup>nd</sup> applicant on 15<sup>th</sup> January, 2007 and that the vehicle has continued to be under the possession of the 2<sup>nd</sup> applicant. The vehicle has therefore been in the possession of the 2<sup>nd</sup> applicant for a period of more than three years. It is obvious that the motor vehicle is depreciating in value due to the fact that it has been stationary for a long time. The allegation that the motor vehicle is stored in an open yard and therefore exposed to elements of weather has also not been disputed. It is further evident that storage charges in respect of the motor vehicle are also accumulating. The applicants' concern that the motor vehicle may lose its value as security is therefore well-founded.

7. Although the appeal was admitted to hearing on 21<sup>st</sup> May, 2009, the appellant does not appear to pursuing its speedy disposal. There is a danger that the motor vehicle may completely depreciate its value by the time appeal is disposed of. In the circumstances, I find that there is need to protect the interests of both parties by obviating any further loss. This court has inherent powers to make orders for meeting the ends of justice. In that regard, I set aside the order issued on 16<sup>th</sup> May, 2008 and direct that the parties shall carry out a joint

inspection and valuation of the subject vehicle, and that the subject vehicle shall be sold at a public auction advertised in the daily newspapers.

8. The proceeds of sale shall be deposited in an interest earning account in the joint names of the parties' advocates, within 21 days from the date of the sale. I further grant the appellant the option of having the subject vehicle released to him upon deposit of a sum of Kshs.1 million into court within 15 days from the date hereof. Those shall be the orders of this court.

Dated and delivered this 21<sup>st</sup> day of April, 2010

**H. M. OKWENGU**

**JUDGE**

In the presence of: -

Anzala for the appellant/respondent

Odayo for the applicant

Eric - Court clerk