



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

(MILIMANI LAW COURTS)

MISCELLANEOUS APPLICATION 927 OF 2007

HENRY OKUM FWAYA.....PLAINTIFF

VERSUS

JOSEPH D.K. KIMANI t/a

ROAM ENTERPRISES LTD.....DEFENDANT

RULING

The applicant herein successfully applied for an order of committal to civil jail against the respondent for contempt of court orders on the 24th day of October 2008, this court, delivered a ruling in respect of the said contempt proceedings and made the following orders:-

- (1) *The Respondent herein namely Joseph D.K Kimani t/a Rosam Enterprises limited, be and is hereby ordered to be arrested and committed to civil jail for a period of 6 months from the date of the arrest and such committal for disobeying the courts' orders, issued on 10th June 2004 in Milimani CMCC 4422 of 2003.*
- (2) *Alternatively the committal period be determined by the period taken by the said respondent to purge the contempt if less than 6 months.*
- (3) *The applicant is at liberty to execute against the respondent for the release of the said motor vehicle.*
- (4) *The applicant will have costs of these proceedings.*

In pursuance of those orders, it is in that the applicant applied for a warrant of arrest to issue against the contemnor, which was issued on 17th day of March 2009. The contemnor was arrested and then taken before the Deputy Registrar of this court, on 21/4/2009 and the said Deputy Registrar referred the matter to this court. Parties duly appeared before this court, on 28/4/2009 when the contemnor informed the court, that he would not comply with the order for the release of the Motor vehicle because the same had been sold to pay off storage charges. That as at the time it was sold, it was valued at 220,000/= which the contemnor is willing to pay in instalments to purge the contempt.

It is at the mention of the value of the disposed motor vehicle to be Ksh 220,000.00, that counsel for the applicant informed the court, that the vehicle had been valued for 400,000/- at the time of seizure and if the contemnor is to purge his contempt then he has to pay that amount.

Since the court, did not have documents of the valuations relied upon by both sides, the parties were asked to file affidavits annexing the documents evidencing the respective valuations. This was done, and the respective affidavits filed on 30/4/2009. The applicants' affidavit has annexed a copy of the log book annexed HOF showing indeed the applicant is the last registered owner of the said Motor Vehicle, having received transfer from one Patrick, Mahulo Okumu. The next annexure on HOF 1 is a copy of records from the Registrar of Motor Vehicles, dated 21/6/2002, also showing that the applicant was the registered owner of the said Motor Vehicle with NIC Bank. There is also annexure HOF 2 comprising two documents the first one being an AA of Kenya valuation report which gave the value of the said vehicle as at 3/9/1999 to be Kshs 395,000.00. The next document under HOF 2 is an insurance cover document showing that the value then was Kshs 400,000.00.

The above information has been countered by the information and annexures in the affidavit of the contemnor. The sum total of the same is that indeed he attached the said Motor vehicle, and had it stored at Pangani Auction Centre yard, whose charges were 150/- per day, which charges accumulated to a figure of 280,000.00. Him contemnor, was unable to pay the same, forcing the said chattel to be valued at Kshs 220,000/- for open market value, and Kshs 154,000.00 for forced market value. Annexure JDK1, contains gazette notice number 3165 of 5th April 2007. The said notice annexed from Pangani Auctioneers Centre, where the contemnor had stored the vehicle. Motor Vehicle KAK 483Q is one of the items advertised for collection failing which, the same were to be disposed of by way of Public Auction or private treaty. JDK 1, was followed by JDK 2, a public notice for a public Auction for sale of various items among them the vehicle subject of these proceedings. The advertisement appears to be in May 2007 on a date not visible. There is a valuation report dated 17th May 2007 by Messers Kar Consult Assessors who place the value at Kshs 220,000.00 as the market value and Kshs 154,000.00 as the forced market value. The general remarks made by the valuer are as follows:-

“The subject Motor vehicle is generally in a good condition. However the vehicle has been stationary for over 3 years, as noted on the expiry date of the road licence and the insurance cover which expired in June 2002 and March 2003 respectfully. This means that there may be other damages not seen that may come up due to weathering, mostly on the tyres and on the rubber bushes. The oils and greases will require to be changed due to expiry.”

Due consideration has been made by this court, of the Rival arguments advanced herein, by the counsel for the applicant on the one hand, and the contemnor on the other hand, as supported by their respective affidavits, and annexures, and the court proceeds, to make the following findings concerning the issues raised herein:-

- (1) There is no dispute from the contemnor that indeed orders were issued in Milimani commercial court, CMCC 44 22 of 2003 on 10th June 2004, instructing the contemnor trading as Rosam Enterprises Ltd to release the attached motor vehicle.
- (2) The court, was informed that, the contemnor, herein appealed against that order, but he lost the appeal, though the circumstances under which the appeal was lost are not very clear.
- (3) There is no dispute that by reason of the failure to succeed on appeal and lack of stay of execution of the lower courts' orders, orders being in place, the contemnor as the addressee of the grieving orders was obligated to observe the said orders in obedience and not in breach.
- (4) It is not in dispute that the contemnor, has not denied being the addressee of the said orders.
- (5) There is no dispute that indeed the said motor vehicle was stored at Pangani Auction Centre for a period of three years.

(6) It is evident from the documentation exhibited, that m/s Pangani took steps under the un collected goods Act, and gave notice to the contemnor by way of correspondence, Kenya Gazette notice, and Public Auction notice advertisement in the Daily standard, that if the said motor vehicle was not collected within 30 days from the date of publication in the Kenya gazette, notice, the same was going to be disposed off by way of sale either through public Auction or private treaty.

(7) There is no submission or deponement by the said contemnor that he had no knowledge of matters stated in No. 6 above.

(8) It is evident, that despite the notification, the contemnor took no action to alert the applicant of the impending consequences, neither did he take any remedial action to avert the impending consequences.

(9) It is not in dispute that it has been 4 years, 10 months and 20 days to the date of 30/4/2009 since the orders alleged to have been disobeyed were made. It is the stand of this court, that any prudent person would have anticipated accumulation of storage charges.

(10) It has not been demonstrated that upon receipt of both the correspondence, notification in the Kenya gazette, and advertisement for public auction, the contemnor took steps to inform the applicant of the dangers of him applicant losing the said chattel in the manner advertised notwithstanding the fact that the applicant is in law deemed to have notice of anything published in the Kenya Gazette and newspapers.

(11) It has been deponed by the contemnor, that the vehicle had accumulated storage charges of 280,000.00 and when auctioned it fetched 200,000.00 which proceeds were applied towards defraying of the storage charges, leaving an outstanding amount of 80,000.000 yet to be defrayed. It is however to be noted that the said deponement has not annexed any documentation evidencing the total storage charges levied by Pangani Auction Centre, amount of the proceeds of sale, how applied and balance outstanding.

(12) There is no deponement or documentation from Pangani Auction Centre, supporting the contemnors submissions and deponement on the amount charged as storage charges, proceeds or value of the sale of the vehicle, amount outstanding on storage charges.

(13) The contemnor has asked the court to take into consideration the international standards of depreciation of a motor vehicle being 25% of its total value at any one given time but has annexed no document to prove the same.

(14) The applicant also asked the court to take note of the current market value of a similar motor vehicle as being Kshs 600,000.00 up from the earlier valuation of 395,000.00 or 400,000.00, but him too, has not exhibited any documentary proof to that effect which this court, can use as a guide.

When the afore enumerated findings of the court, are applied to the rival arguments of the applicant, and the contemnor, the applicant seems to be saying the following:-

- the contemnor is to take all the blame for what transpired herein leading to the filing of these contempt proceedings.

- Since the order for committal of the contemnor, to the Civil Jail for six months is in place and as long as it stands, the court only has three options to resort to in dealing with the contemnor namely:-

(a) commit the contemnor to civil jail.

(b) Order him to return the motor vehicle.

(c) Since it is evident that the vehicle was sold, the court, can order the contemnor, to refund the current market value of the sold motor vehicle of Kshs 600,000.00 up from 395,000.00 where as the contemnor on the other hand is urging the court, to do the following:

- not to sent him to Civil Jail, but allow him to purge the contempt by making good the value of the sold motor vehicle.

- In ordering him to make good the value of the sold motor vehicle to the applicant, the court, to take note of the fact that the applicant is to blame for the attachment as both of them represented that the vehicle belonged to the brother that storage charged has to be paid and the vehicle depreciated at 25% annually. Lastly he be allowed to liquidate the same through instalments.

Due consideration has been made by this court, of the above sentiments expressed by both sides as regards the mode of purging the contempt, and the court, proceeds to make the following orders:-

(1) The orders disobeyed of 10/6/2004 were court orders. It is now trite law, that a court, order once it is issued and unless set aside and or vacated, it has to be observed in obedience and not in breach and any addressee of such an order who breaches the same risks facing the consequences of civil jail and or a fine..

(2) That it is now trite law, that it is the duty of the court, to ensure that its orders are obeyed whenever issued in order to preserve its dignity and to make itself effective. It therefore follows that this court, will be failing in its duty if it were to let the contempt displayed herein to go unpunished.

(3) It is on record that the contemnor is an officer of this court, which position does not guarantee him the right to disobey orders of the institution to which he belongs with impunity. Where disobedience is proved, he stands to face the same consequences as any other contemnor.

(4) The court, is satisfied that the contemnor herein disobeyed court, orders as ruled in the previous ruling of 24th day of October 2008

(5) The court, takes judicial notice of the fact that contempt of court, proceedings are quasi criminal, that is why they attract jail terms and fines as options. Herein the contemnor is confronted with a jail term. He has however pleaded with the court, to purge the contempt using a different mode other than a jail term. In this courts' opinion, the alternative to a jail term is a fine or restoration of the chattel or its equivalent value. If it is a fine, this court, has judicial notice of the fact that there is no standard prescription for this in the law, governing punishing for contempt. It means that the same is left to the discretion of the court, which discretion is now trite law, that it has to be exercised judiciously and with reason.

Herein the contemnor has not asked for a payment of a fine, but restoration, which restoration is not for the release of the motor vehicle detained but its value. The guiding parameters of this value are those demonstrated by the documents annexed to his affidavit which is 200,000.00. This court, was invited to take note of the remarks preceding the value, which are already set out herein, and the court, finds that the assessor clearly stated that the value reflected the state of the condition of the vehicle at the time of the assessment. It had been stationary for 3 years. Those three years in this courts' opinion, are attributable to the contemnor who failed to heed the courts' orders of 10/6/2004 to release the same. Had it been released then the court, doubts. If it had depreciated to that extend. It therefore follows that the value of 200,000.00 has to be construed against the contemnor.

If the value of 200,000.00 is to be construed against the contemnor, then the court, has to determine which is the appropriate restoration value, that the contemnor is to give, in order to purge the contempt. It is on record that the court, has been invited to go by the opinion of the counsel, that the current market value is 600,000/- but as mentioned in the findings, this has no back up documentation. The value with back up information is that of the valuation in 1999 of 395,000.00. This is what the court, will use as a yard stick. Any other loss in value forms a new cause of action in favour of the applicant to be pursued in another forum.

In the premises, the court, makes an order that the contemnor be and is hereby allowed to purge the contempt by a mode alternative to civil jail, by paying to the applicant the documented value of the

unreleased vehicle of Kshs 395,000.00 within 30 days from the date of this order.

(2) In default he be committed to civil jail forth with.

(3) To ensure compliance the contemnors' bond will be extended to the date when next he will appear in court, to confirm compliance within the 30 days given.

(4) Although the contemnor has alleged that the applicant and his brother contributed to the state of affairs witnessed herein by first of all representing that the vehicle belonged the applicants brother and for failing to pay the debt, owed, that is no mitigating fact or as the contemnor was obligated to confirm on ownership of the vehicle attached as soon as attached to escape accusation of wrongful attachment which was the case herein. And as soon as it was brought to his attention, that the chattel attached did not belong the judgment debtor, he should have confirmed the position through search, with the Registrar of motor vehicles' department and as soon the correct position is confirmed, he would then release the vehicle. He failed to do so at his own peril, and as such he has to face the consequences of paying costs of these proceedings and it is so ordered.

(5) Mention on 19/6/2009 to confirm compliance.

Dated, Read and delivered at Nairobi this 15th day of May 2009.

R.N.NAMBUYE

JUDGE