



REPUBLIC OF KENYA

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

Civil Appeal 65 of 2008

CITY COUNCIL OF NAIROBI.....APPELLANT

VERSUS

FREDRICK K. KIMANI.....RESPONDENT

R U L I N G

On 8th of November, 2007 Ms. Mokaya, Senior Resident Magistrate, issued an order for release of motor vehicle Registration No. KUP 652, to the registered owner Fredrick K. Kimani who is the respondent herein. This was an interim order pending the hearing of an interlocutory application made by the respondent in Civil Suit No. 8878 of 2007 filed in the Chief Magistrate's court Milimani. In the main suit the respondent sought an order for release of his aforementioned vehicle as well as damages for loss of user. The motor vehicle had been impounded by the appellant on the 1st of October, 2007 pursuant to powers given to the appellant under "the City of Nairobi (designated parking places) amendment by-laws 2007".

The order for release of the motor vehicle which was made exparte was conditional on the respondent depositing a sum of Kshs.4,070/=. The appellant did not release the motor vehicle.

On 28th January 2008, the application came up for interparte hearing during which the appellant objected to the release of the motor vehicle claiming that the charges due to it arising from the impounding of the motor vehicle was Kshs.52,070/= made up of towing charges, clumping charges and daily storage charges. The respondent objected to the appellant being heard in the interlocutory application due to the appellant's failure to comply with the order for release of the motor vehicle, whereupon Ms. Mokaya ruled that the appellant had to comply with the interim court order failing which, an application for contempt of court could be made. Ms. Mokaya further confirmed the interim order requiring release of the motor vehicle forthwith noting that the appellant had not filed any defence or raised any counter-claim. Being aggrieved by that ruling the appellant has now filed a memorandum of appeal in which it seeks to have the ruling of Ms. Mokaya made on 28th of January, set aside and an order made for sufficient security before release of the motor vehicle.

By a notice of motion filed on the 19th of March, 2008, the appellant has now come to this court under Order XLI Rule 4 of the Civil Procedure Rules and Section 3A of the Civil procedure Act seeking an order for stay of the orders made by Ms. Mokaya on 28th January, 2008 in Milimani CMCC 8878 of 2007 pending the hearing and final determination of the appeal.

The respondent has raised a preliminary objection to the hearing of the appellant's notice of motion on the ground that the appellant has disobeyed the lower court's orders issued on 28th November, 2007,

28th of January, 2008 and 22nd of February, 2008 and therefore they ought to purge the contempt before they can be heard. It was submitted that the appellants must submit to the order of the court before it can be heard. In this regard reliance was placed on the following authorities: -

1. **Civil Application No.Nai 252 of 2002 Joseph Kibe Mungai vs. Arnold Muhoho Johana.**
2. **Civil Application No.Nai 300 of 1999 Nairobi City Council and 4 others vs Qurdoba Enterprises Ltd.**
3. **Civil Application No.290 of 2002 Joseph Njoroge Kamau vs. Joseph Maingi Mugwika.**

For the appellant it was submitted that since the appellant has appealed against the order of the court, which is subject of the alleged contempt it should not be compelled to comply with that order, as to do so would result in their appeal being rendered nugatory. It was submitted that the order of the lower court was a mandatory order which in effect dispensed the case even before the parties were heard.

Referring to Civil Application of **No. Nai 63 of 2003 Purshotam Ramji Kotecha & Another vs Narandas Ranchoddas Pau & Another**, it was submitted that since the appellant had through no fault of its own been denied a hearing in the lower court, it ought not to be compelled to comply with the order made in violation of the rules of natural justice.

Having perused the memorandum of appeal it is evident that the appellant is aggrieved by the order made by the trial magistrate for release of the motor vehicle KUP 652 as it is of the view that the order does not provide for sufficient security to the appellant who claims a lien over the motor vehicle. The appellant is also aggrieved that the trial magistrate refused to hear the appellant due to its failure to comply with the order for release of the motor vehicle.

Where a person is aggrieved by an order made by the court he has a right to apply for review or setting aside of the order or appeal against that order to a higher court. The person also has a right under Order XLI Rule 4 of the Civil Procedure Rules to apply for an order for stay of execution of that order either in the lower court or before the high court pending the hearing of an appeal if such is intended.

In this case the appellant did not seek any order for stay of execution of the interim order for release of the motor vehicle either before the trial court or the high court. Nor did the appellant apply for setting aside of the order which it contends was made *ex parte*. The appellant simply ignored the order and attempted to proceed with the interparte hearing of the respondent's application. An attempt to set aside the order was only made in the lower court after the court had made the order of 28th January, 2008 refusing to hear the appellant. The appellant contended that the interim order for release of the motor vehicle essentially determined the suit before the actual trial. That is however not so. The claim includes a prayer for loss of use, and the suit therefore remains alive notwithstanding the release of the motor vehicle.

In this case, an order having been made for the release of the motor vehicle way back on the 8th of November, 2007, and there being no order staying execution of that order, the appellant is obliged to comply with the same before it can be heard by this court. Indeed his appeal would not be prejudiced as the court can still make appropriate orders regarding security. For these reasons, I uphold the preliminary objection and rule that the appellant must comply with the order made on the 8th of November, 2007 before it can be heard by this court.

Dated, signed and delivered this 29th day of April, 2008

H.M. OKWENGU

JUDGE