REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT BUSIA

CIVIL APPEAL NO.55 OF 2013

THE COMMISSIONER OF CUSTOMS SERVICE.....1ST APPELLANT

THE COMMISSIONER GENERAL, KENYA REVENUE AUTHORITY.....2ND APPELLANT

VERSUS

SIMBA LOGISTICS.....RESPONDENT

J U D G M E N T

[1] This appeal is against the ruling made and delivered on the 13th November 2013, by the Principal Magistrate in **Misc.Civil Application No.21 of 2013**, in which Simba Logistics Ltd (**respondent**) applied vide a notice of motion dated 22nd October 2013 for the release of the registration number plates and ignition keys, of its m/v Reg No.KBT 724A Scania truck pulling a trailer Reg No.ZE 1524 and permanent restraining orders against the Commissioner of Customs Services and the Commissioner General of the Kenya Revenue Authority (**appellants**) from detaining and holding the said vehicle and ignition keys.

[2] On the 23rd October 2013, the court issued ex-parte interim orders against the appellants to the extent that the material m/vehicle and ignition keys be released unconditionally to the respondent pending hearing and determination of the application inter-parties.

However, the respondent subsequently filed a second notice of motion dated 25th October 2013, for a notice to issue to the appellants to show cause why they should not be committed to civil jail for six (6) months and/or be punished in any other way for failing to comply with the court order issued against them on 23rd October 2013.

[3] Prior to the hearing of the two motions, the appellants filed a notice of motion dated 30th October 2013, which was amended on 1st November 2013, seeking stay of the ex-parte order made on 25th October 2013 and a variation, discharge or setting aside of the interlocutory order made on the same date.

The appellants also sought to have their preliminary objection dated 30th October 2013 and not 28th October 2013, set down for hearing. This objection was anchored on the jurisdiction of the court to deal with an application for contempt of court.

[4] The trial court heard all the applications and concluded as follows:-

> **"It is not worthy to state here that the motor vehicle being unlawfully held is used for business of transportation and the continued withholding the same is causing a lot of loss to the user of that vehicle. Nobody has been charged as yet. The vehicle is held illegally and the court cannot perpetuate on illegally of (sic) the owner of the vehicle committed an offence he should have been charged.**
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> **I find no good reason to vacate or stay the orders sought. I order that the respondent release the suit motor vehicle and proceed to prefer any charges if any that they may deem fit. I also order that after the said release the respondent cease from further seizing the motor vehicle."**

[5] The appellants were aggrieved by the ruling and filed the present appeal on the basis of the grounds set out in the memorandum of appeal dated 20th November 2013. Their main prayer is that the impugned ruling of the trial court be set aside. The appeal was filed together with a notice of motion seeking stay of execution of the impugned orders. Accordingly, stay orders were granted on the 10th December 2013, with regard to the part of the impugned ruling which reads, "**I also order that after the said release the respondent cease from further seizing the motor vehicle**".

[6] The hearing of the appeal proceeded by way of written submissions.

Both parties filed their respective submissions for and against the appeal through **Twahir Alwi Mohamed Advocates** and **Ipapu & Co. Advocates**, respectively. The duty of this court was to re-consider the application as presented and argued before the trial court and draw it's own conclusions. In that regard, the court noted that the applications particularly those by the respondent were filed and prosecuted in the absence of a substantive suit instituted against the appellants in accordance with Order 3 (**1**) of the **Civil Procedure Rules**.

[7] The respondent thus obtained drastic and permanent injunctive orders against the appellants by way of a notice of motion brought under a certificate of urgency. This action amounted to a fatally defective application and procedure. Besides, the impugned application dated 22nd October 2013, was clearly brought under irrelevant and erroneous provisions of the law. **S.3A** of the **Civil Procedure Act** deals with the inherent powers of the court which cannot be exercised any howly. **Sections 4** & **5** of the **Criminal Procedure Code** deal with trial of offences under the penal code and any other law. They relate to criminal cases and not civil cases and were completely irrelevant for the purposes of the impugned application and so was Article 49 (**1**) (**f**) of the Kenya Constitution, 2010.

[8] There is a clear distinction between a suit and an application. In a suit, a party files a suit in order to seek justice in respect of any right or claim to which he is entitled. The party filing the suit becomes the plaintiff and the person against whom the suit is filed becomes the defendant. Such scenario did not exist in this matter. Instead, the respondent moved the court against the appellants by filing an application vide a notice of motion where it was the applicant while the appellants were respondents.

[9] Such applications are usually filed as a prayer for mostly a temporary relief pending the outcome of a substantive suit filed against the respondent. The outcome thereof is normally an interim rather that a final or permanent order.

In matters of urgency, **Order 40** of the **Civil Procedure Rules** would normally be invoked. It presupposes the existence of a suit and requires the applicant to file a certificate of urgency to enable commencement of the action concurrently with the filing of a suit.

[10] All the foregoing factors clearly show that the impugned application which gave rise to subsequent applications was indeed fatally defective from the beginning. It was "dead" on arrival at its supposed entry point such that no amount of "oxygen" would have breathed life into it nor can it breathe life into it by way of this appeal.

In the circumstances, it would not be farfetched for this court to opine that with the substituted of this appeal having been destroyed there is in fact no valid appeal against the impugned application.

[11] Therefore, the impugned application and the proceedings related to it were an exercise in futility. The resultant impugned ruling of the trial court was of no effect and what it did, was only to hand pyrrhic victory to the respondent.

[12] This appeal is therefore allowed on the basis of all the foregoing reasons rather than those contained in the memorandum of appeal.

Accordingly, the ruling of the trial court dated and delivered on 13th November 2013 is hereby set aside together with all consequential orders.

The parties shall bear their own costs of appeal.

Ordered accordingly.

J.R KARANJAH

J U D G E

[Delivered and signed this 13TH day of JULY 2021]

[In the presence of M/s Sega for Appellant and Mr. Omeri holding brief for Ipapu for respondent]