



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MURANG'A

CIVIL APPEAL NO. 9 OF 2020

PERMINUS MAINA MWANGI.....APPELLANT

VERSUS

MARTIN KINYUA GICHUA.....RESPONDENT

RULING (NO. 2)

1. There are two principal prayers in the appellant's notice of motion dated 13th August 2021: Firstly, for an order to punish the respondent for contempt of a court order; and, secondly, for a temporary injunction or release of the appellant's motor vehicle registration number KCU 362E (hereafter *the vehicle* or *chattels*)

2. Those matters are detailed at length in the appellant's deposition sworn on 13th August 2021.

3. The application is contested through *Grounds of Opposition* and two replying affidavits sworn by Daniel Wokabi Mathenge and Martin Kinyua Guchua on 24th August 2021. There is also another affidavit of even date sworn by the auctioneer, Jeremiah Muchendu.

4. On 20th September 2021, I heard brief submissions from learned counsel for the disputants.

5. The genesis of this matter is a decree made on 7th July 2020 in *Murang'a Chief Magistrates Court Civil Case 240 of 2017* which ordered the appellant to refund the respondent Kshs 626,095 for breach of contract of sale of the motor vehicle.

6. The appellant approached the High Court for stay pending appeal. In a considered ruling delivered on 6th May 2021, I granted a *conditional stay* in paragraph 13 thereof as follows-

a) That the stay is granted upon the condition that the appellant deposits the decretal sum of Kshs 626,095 into a joint interest earning account of both counsel within 21 days of today's date.

b) That in default of condition (b) above, execution shall issue.

c) That in the interests of justice, the appellant shall cause the record of appeal to be lodged not more than ninety days from today's date; and, shall ensure that the appeal is presented to the judge in chambers for admission or directions within a further thirty days.

7. The appellant was aggrieved by the terms of that order. It is not also clear what steps the appellant took to comply with order (c) above on setting the main appeal for admission or directions. What is certain is that the monetary deposit was not made. That may explain the further motion dated 30th July 2021 seeking review of the above order to deposit a title deed or other property instead of cash. That motion is still pending for hearing.

8. In the meantime, and to avoid execution, the appellant sought a further stay. The matter was placed before the Recess Duty Court at Embu on 5th August 2021. An interim order of stay was issued by *Njuguna J* which was to lapse on 10th August 2021. When learned counsel for the appellant appeared before me on 12th August 2021, he seemed to be unaware of that order. Certainly, the order was *not* extracted or *served* until the end of the court session.

9. If the respondent or his counsel are to be believed, they were also unaware of the order. They all claim that the chattels was attached earlier that morning. According to the auctioneer, the attachment took place at 07:30 hours on 12th August 2021 at a police station. He says he learnt of the stay orders later at 14:30 hours.

10. The appellant does not provide clear *timelines* of the execution on that day. At paragraph 5 of his deposition he only avers that the vehicle

was attached at his residence in Thika “*despite a stay order rendered on 5th august 2021 and extended on 12th August 2021 in the presence of the respondent’s advocate*”.

11. The issue for determination is whether the respondent’s conduct is in *contempt* of the order; and, whether he should be *punished* for it. The standard of proof in a matter of this nature is slightly above balance of probabilities. The reason is that the *personal liberty* of the subject would be at stake. It thus behooved the appellant to prove *personal service* of the order and that the respondents flagrantly breached it. ***Shimmers Plaza Limited v National Bank of Kenya Limited***, Nairobi Court of Appeal, Civil Appeal No. 33 of 2012, [2015] eKLR); ***James H. Gitau Mwara v Attorney General & another***, Nairobi HCCC 2892 of 1993 [2018] eKLR.

12. From the timelines I have highlighted, those key elements were *not* proved. The closest was the fact that the order of 5th August 2021 was *extended* on 12th August 2021 in the presence of the respondent’s counsel. He was obviously not there on 5th August 2021 when the order was first granted *ex parte* at Embu High Court The auctioneer has deposed that execution took place at 07:30 hours on the 12th August 2021 and that he was unaware of the order of stay. Those facts have not been meaningfully rebutted by the appellant.

13. It must follow as a corollary that the prayer to punish the respondent for contempt *fails*.

14. I will now turn to the prayer for injunction against attachment or for release of the vehicle. It is not disputed that the appellant did not comply with the terms of the conditional stay granted on 6th May 2021. It is also common ground that proclamation was made in July 2021. This may have prompted the motion for review lodged on 30th July 2021.

15. Like I have stated earlier, at the point of attachment on 12th August 2021, the appellant had *not* served the order of temporary stay issued on 5th August 2021 on either the respondent, his counsel or *Icon Auctioneers*. I cannot thus say that the execution was illegal. That is not to say it was not mischievous. It may well have been. I simply have no clear cut evidence on the matter. It also means that the application for a *temporary injunction* lacks merit and is *dismissed*.

16. But now that there are orders against sale of the car, the appellant has a genuine argument that the chattels will go to waste because it is held in an open yard. The respondent counters that the auctioneer can store the vehicle in better conditions; and, that the best course is to expedite hearing of the main appeal.

17. Justice is a two-way street. The respondent is entitled to fruits of his decree. But I am also alive to the *overriding objective* to do justice to all the parties. ***Article 159*** of the ***Constitution; Harit Sheth v Shamas Charania***, Court of Appeal at Nairobi, Civil Application No 68 of 2008 [2010] eKLR.

18. To ensure that the appellant is not left holding the short end of the stick; and, purely in the interests of justice, I order that the vehicle be released upon payment of Kshs 250,000 to the auctioneer being *half* of the value stated in the Notification of Sale (annexture *PMM3*). The appellant shall before release of the vehicle also pay the costs incurred by the auctioneer to be agreed upon within 14 days or taxed. In the event that the appellant cannot meet these terms, the auctioneer shall ensure that the vehicle is stored in a roofed storage until further orders of the court.

19. Save for the order in paragraph 18 above, the appellant’s notice of motion dated 13th August 2021 is *dismissed* with no order on costs.

It is so ordered.

DATED, SIGNED AND DELIVERED AT MURANG’A THIS 14TH DAY OF OCTOBER 2021.

KANYI KIMONDO

JUDGE

Ruling read in open court in the presence of:

No appearance by counsel for the appellant.

No appearance by counsel for the respondent.

Ms. Dorcas Waichuhi & Ms. Susan Waiganjo, Court Assistants.