REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MIGORI

CIVIL APPEAL NO. 79 OF 2018

TRANSMARA SUGAR COMPANY LIMITED.....APPELLANT

-VERSUS-

HOSEA MUGA.....1ST RESPONDENT

OSCAR ODHIAMBO ODONGO.....2ND RESPONDENT

RULING

This ruling is in respect to the appellant's Notice of Motion dated 11/10/2020 brought under Sections 1A & B, 3A, 63 of the Civil Procedure Act, Order 40 Rule 3(1), The Contempt of Court Act, Section 5 of the Judicature Act, Section 36(1) of the High Court (Organization & Administration) Act, the Constitution 2010 and all other enabling provisions of the Law of Kenya. The appellant seek the following orders:-

> **i. THAT before the determination of the substantive appeal in this matter, this application dated 11/9/2020 be heard and determined on a priority basis since it touches on the execution of the lower court judgement illegally.**
>
> **ii. THAT the 1st and 2nd respondents return to the appellant with immediate effect of motor vehicle registration number KBY 315A, a Toyota Double Cabin which was attached in wilful and deliberate contempt of a lawful court order issued by Justice Mrima on 5/7/2018 in this cause.**
>
> **iii. THAT the 1st and 2nd respondents be punished by this court for contempt of court for deliberately refusing to respect a court order and acting in contempt of a lawful court order issued by Justice Mrima on 5/7/2018 in this cause.**
>
> **iv. Costs do abide the appeal.**

The application is anchored on the grounds on its face thereof and a supporting affidavit sworn on 11/9/2020 by Emmanuel Seriani, the Legal Officer of the appellant.

Briefly, the gist of the appellant's application is that on 5/7/2018 this court issued an order staying execution arising from the ruling and order of Hon. Kamau CM dated and delivered on 19/6/2018; that they tried serving the respondent on the same day but their offices were closed; that on 6/7/2018 the appellant's counsel on record visited the office of the counsel of the respondent but found no one; that the process server produced three copies of the order and mounted a copy on the door of the respondent's entrance door and another copy was slipped through the door; that on 9/7/2018 three days later, the appellant sent its counsel to Rongo Law Court with the said motor vehicle KBY 315A and the 2nd respondent attached the said motor vehicle; that the appellant's advocate showed the 1st respondent's advocate and the 2nd respondent a copy of the court order but they ignored it and proceeded to drive away the said motor vehicle ignoring the order; that disobedience of the court order was wilful and without any lawful excuse and in contravention of the law; that despite demand to have the 2nd respondent release the motor vehicle, they have refused and continue to illegally retain the vehicle.

The application was opposed. The 1st respondent filed his replying affidavit dated 11/12/2020 evenly. He deponed that by a proclamation dated 26/6/2018 effected in Rongo SRMCCC No. 260 of 2016, the appellant's properties were duly attached and left at her yard for collection later; that the order issued on 5/7/2018 was never served upon himself or his advocate for compliance; that the issue of non-service of the order dated 5/7/2018 on the part of the appellant was already settled in a notice of motion dated 11/7/2018; that it is not true that his advocate was served with the said order by Brian Mboya Advocates, then holding brief for appellants counsel in court on 9/7/2018 in the Notice of Motion dated 11/10/2020; that the notice of motion dated 11/10/2020 is duplicitous and res-judicata of the application dated 11/7/2018; that the notice of motion dated 11/7/2018 is an unprocedural amendment of the application dated 13/7/2018; that the auctioneer acted on his own motion as an officer of the court and was not under the directions of the Respondent's advocate; that he is not aware of any order for the release of the attached motor vehicle which had already been auctioned.

The application was canvassed by way of written submissions which I have duly considered.

It is this court's opinion that the twin issues for determination that arise are:-

i. Whether the application dated 11/10/2020 is res-judicata;

ii. Whether the Respondent is in contempt of the court order;

iii. What are the appropriate and just orders this court can make in respect to the application?

Whether the application is res-judicate? Section 7 of the Civil Procedure Act provides for what amounts to res-judicata. It states:-

> **"No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.**"

Though the facts in the application dated 11/7/2018 are similar to the instant one, i.e. touching on contempt of court, the application was not determined on the merits. It was struck out for being incompetent. It means that the appellant had a right to bring another application based on the same facts. For a matter to be res-judicate it should have been determined on the merits or finally.

The factual issue which triggered these proceedings is that there was an order issued by this court on 9/7/2018 being an interim order of stay of execution of the judgment and decree dated 9/5/2018.

The appellant has strenuously submitted that despite service upon counsel of the 1st respondent, he proceeded together with the 2nd respondent, to attach motor vehicle registration number KBY in contravention of the court orders issued on 9/7/2018. On the other hand, the 1st respondent has submitted that there was no judgement delivered 19/6/2018 in Rongo SRMCCC NO. 260 of 2016 as submitted by the applicant; that the only judgement in the lower court was delivered on 9/5/2018 and no appeal lies against it.

The correct position as per the court records is that the judgement delivered by Hon. Kamau C.M. in Rongo SRMCC is dated 9/5/2018. The order issued by Hon. Mrima J on 9/7/2018 was for staying the execution of the aforementioned judgement and decree. The applicant therefore refers to a non - existent judgement and decree dated and delivered on 19/6/2018. The record of appeal however correctly indicates that the appeal is against the judgment delivered on 9/5/2018.

Even in its submissions, the appellant did not correct this position as a sheer oversight on their part if at all, in order to reflect what they intended to refer to, that is, the judgment /decree dated 9/5/2018. I find it difficult to continue writing this ruling since it is hinged upon a non-existent judgement and decree. This is a court of facts and heavily relies upon the parties pleadings filed by the parties to effectively dispense its function of administration of justice and therefore cannot ride on assumptions on what the parties intended to submit. The court cannot arrogate upon itself the duty to correct pleadings on behalf of parties. Submissions and filing of correct pleadings is essential to assist the court in the fast and effective disposal n of cases.

I also note that the appellant's application is dated 11/10/2020 but it was filed on 8/10/2020. How possible is it to file an application which has a future date? On ground number 2 on the face of the application, the appellant refers to a contempt application dated **'11/9/2020.'** I am not aware of such an application filed before this court. I am not certain what counsel for the appellant wished to communicate to this court. This court would expect that after the Respondent filed their reply, the applicant's counsel would bother to correct the glaring errors raised by the Respondent but counsel never did.

In addition, the appellant has annexed to their submissions, documents which they intended to rely on as evidence to support their application. Ordinarily the documents ought to have been annexed to the supporting affidavit of Emmanuel Seriani. This is not a new practice in law. Any evidence in the context of filed applications which a party wishes to reply on must be contained in a supporting or replying affidavit with annextures if any, unless otherwise as may be directed by the court. This is because submissions are not evidence. In the case of **Daniel Torotich Arap Moi=vs= Mwangi Stephen Muriithi and Another (2014)eKLR,** the court restated the role of submissions in a case. The court said:-

> **"Submissions cannot take the place of evidence. The 1st respondent had failed to prove his claim by evidence. What appeared in submission could not come to his aid. Such a course only militates against the law and we are unable to countenance it. Submissions are generally parties' "marketing language," each side endeavouring to convince the court that its case is the better one. Submissions, we reiterate, do not constitute evidence at all. Indeed there are many cases decided without hearing submissions but based only on evidence presented."** Also see **Raila =vs= I. E. B. C. & 2 others (2013)eKLR.**

The above decision goes to confirm that submissions are that evidence and therefore one cannot purport to annex documents to submission.

Supposing any of the parties wished to cross - examine the deponent on the contents of their affidavits, would it make sense to rely on and refer to the annexed documents to their submissions? The appellant's Supporting Affidavit as it stands is full of speculations and may not assist the court.

When an Advocate is instructed by a client, he is expected to exhibit professionalism and utmost diligence as their agent. Annexing documents to submissions is negligence at its best and from what I have considered above, that is wrong dates in the application, exhibits

annexed to submissions, it seems that the Advocate's heart was not in this matter.

In as much as parties may want to seek refuge under Article 159 (2) (d) of the Constitution 2010, that requires courts to administer justice without undue regard to technicalities, yet the same cannot be used to circumvent set down Rules of Procedure. In addressing Article 159, J. Kiage in **Nicholas Kiptoo Arap Korir Salat =vs= ERC & 6 OTHERS (2013) eKLR** said as follows:-

> **I am not in the least persuaded that Article 159 of the Constitution and the Oxygen principles which both command courts to seek to do substantial justice in an efficient, proportionate and cost effective manner and to eschew defeatist technicalities were ever meant to aid in the overthrow or destruction of rules of procedure and to create an anarchical free for all in the administration of justice. This cannot and indeed all courts must never provide succour and cover to parties who exhibit scant respect for rules and timeliness."**

Coming back to the substance of the application before me, in an application for contempt of court, the applicant must demonstrate that the contemnor knows the terms of the court order, the said terms must be clear and unambiguous and that there is wilful disobedience of the court order by the Respondent. There is no evidence that such order was issued and that it was served on the Respondent as alleged.

In the end, the application dated 11/10/2020 lacks merit and is hereby dismissed with costs to the respondents.

DATED, DELIVERED AND SIGNED AT MIGORI THIS 6TH DAY OF OCTOBER, 2021

R. WENDOH

JUDGE

Ruling delivered in the presence of

Ms. Otieno holding brief Mr. Oyagi for the Appellant.

Mr. Gembe for the 1st Respondent.

No appearance for the 2nd Respondent.

Nyauke Court Assistant.