REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

MISC. CIVIL SUIT NO. 306 0F 2018

WILLIAM KIPKORIR ARUSEI.....APPLICANT

VERSUS

1. **NIC BANK PLC**
2. **GATHOGO t/a VALLEY AUCTIONEERS**
3. **EMPRO ELECTRICAL & MECHANICAL ENGINEERS COMPANY LIMITED**
4. **CAR MAX (E.A) LIMITED.....RESPONDENTS**

R U L I N G

1. The court has been moved to make a determination on two applications filed by either side. The applications in the order counsel agreed to have the same handled are as follows:

Application by NIC Bank Ltd date 25/2/2019

2. This application prays for order that part of the court orders issued on 18/12/2018 requiring the applicant to release the motor vehicle Registration **No. KCL 707Q** to the 3rd Respondent upon payment of Kshs.500,000, be set aside on account that the same was issued without jurisdiction and thus a nullity.

3. That application was supported by the Affidavit of HULDA MENGELE and sets the grounds that the same were instantaneous and made pursuant to the invocation of undisclosed provisions of the Consumer Protection Act. It is thus contended that the order was erroneous because the person in whose favour it was made did not seek such an order having not filed any papers in the matter. An addition was that the matter having been withdrawn there was no suit upon which to found any other orders being made and that the same were issued without according to parties the right to be heard. Pursuant to the impugned orders it was added, the 1st Respondent, William Kipkorir Arusei, had filed an application to commit the Applicant's Officers to Civil jail for contempt.

4. In arguing the Application the applicant filed three lists of authorities dated 28/01/2019, 25/2/2019 and 22/5/2019 and written submission dated 22/5/2019.

5. In opposition to the application the Respondents filed Replying Affidavit sworn by Sethna Isabwa Atonga advocate as well as list of authorities and written submission. In those documents the Respondent contend that the orders of 18/12/2019 were regularly and validly entered towards furtherance of the justice between the parties and should not be interfered with. The application is considered and seen as abusing of the court process in that it was filed on the eve of the date set to learn the Respondent's own application for contempt.

6. In addition the Respondent contended that having not purged the contempt they have no right to be heard and that the question on jurisdiction is designed and intended to mislead the court and steal a match upon the respondent.

7. On the merits the respondent points out that the Affidavit filed by the Applicants legal officer in response to the Application for contempt admitted that the Applicant received the sum ordered by the court and sought to be given the particulars of the position to collect the motor vehicle and that the vehicle was actually released to the advocate and the immediately taken away by the applicant's agents.

8. It was then contended and asserted that the facts said to question the jurisdiction of the court are not in the nature of preliminary objection. The respondent then delved into the conduct of the Applicant prior to and after the impugned orders to paint a picture of a litigant not keen to obey court order but keen to get his way at all costs.

The Application by the Respondent dated 15/01/2019

9. This application prays for orders that the warrants of arrest to issue immediately against several officers of the Applicant, the auctioneer and officers of an entity called Car Max (E.A.) Ltd, for the immediate detention of the said persons pending rising (sic raising) of the court order; that the said person be made to show cause why they should not be committed to prison for unlawful disobedience of court orders and that they be committed to jail for a period determined by the court.

10. The application sets out 11 grounds which in summary assert that the court orders have been brought to the attention of the respondent, the respondent have callously and unjustifiably disobeyed same in a manner that puts the dignity and authority of the court system into disrepute.

11. When parties appeared to argue the two applications, it was agreed that the Application dated 25/2/2018 be heard first. That decision was informed by the appreciation that it raises issues of jurisdiction of the court and that it needs thus take precedence of over all else. The second reason that decision was reached was the appreciation that if the court was to find for the applicant then the other application would become moot for lack of a pedestal to stand upon. Accordingly I will handle the application dated 25/2/2019 first and only seek to consider the one of 15/1/2019 in the event the one of 25/2/2019 fails.

Should the orders of 18/12/2018 be set aside?

12. The common ground between the parties is that the matter having been filed on the 16/11/2018 by the Notice of Motion dated 13/11/2019, essentially seeking to **have Eldama Ravine RMCC No. 102 of 2018** withdrawn from the court to the court in Mombasa, the same was on the 18/12/2018 sought to be withdrawn by the applicant and the request to withdraw was never contested but conceded by the Respondent. The rationale of intention to withdra0w was revealed to be that the suit the application was targeting for transfer had been withdrawn the previous day hence there was no purposeful goal to be achieved by having it heard.

13. On that day, Mr. Atonga advocate is recorded to have addressed the court as follows:-

> **"I agree the Eldama Ravine suit was withdrawn yesterday. However in this matter the bank obtained orders by concealment of material facts that the motor vehicle had been repossessed. It was alleged that we had obtained orders restraining repossession. We only obtained orders to stop sale and transfer. We have spoken and agreed that I file a fresh suit in Nairobi but the point of departure is that the bank is not willing to agree to the release of the motor vehicles. My client is prepared to pay the sum in dispute to court or the bank. Mr Kongere's application can be marked as compromised but with no orders as to costs and insist on hearing of my application in terms of prayer 7 only".**

14. Being faced with the prospects of having to hear an application by the Respondent itself filed within the instituting application the proponent had opted to withdraw and being aware that no court can compel a party to proceed with its own matter once the party opts to withdraw, the court sought to find out, from the parties and the pleadings filed, the real dispute between them.

15. Without so saying the court sought to invoke its inherent powers in order to stop abuse by entertaining non-disputed facts. The court then sought to establish what was the sum outstanding on the admitted hire purchase agreement. I had a look at a document apparently authored by the applicant addressed to valley Auctioneers and ordering repossession. That document was annexed in the Replying Affidavit of WILLIAM KIPKORIR ARUSEI Sworn on 3/12/2018 and exhibited as annexture "WKA 2". In the that document the bank was unequivocal that the sum due to it was Kshs.429,005.06 as at 24/10/18.

16. I equally looked at the hire purchase agreement exhibited by the bank as **annexture SA 3** in the application dated 13/11/2018 and did confirm that the purchase price was indeed Kshs 5,088,000.

17. With those two sums, I applied my mind to the provisions of the consumer protection Act. PART 5, and without specific reference to Section 20, deemed it just that the matter needed was not start afresh. This court did proceed from the knowledge that being a court of law, it is expected to know and apply the law even when the same is not cited to it, and thus so preceded[1].

18. That notwithstanding however the records as they stand today do not capture the fact that the documents I relied upon were pointed out to me by the counsel appearing for the parties on that day. Having so acted, the applicant now faults the court for having dealt with this matter by issuing substantive orders on a matter which stood withdrawn and prior to asking the parties to address the court on an application which had not been argued.

19. To this court, this was a matter that squarely fell with the courts inherent powers and best suited to serve the overriding objectives of the court by being dealt with to finality. However I do also appreciate that the need for expeditious administration of justice must also yield to basic principles of law and the particular those of nature justice as now robustly enshrined in the bill of rights.

20. I concede to the Applicants position that once the matter was withdrawn by the applicant and after the respondent sought to argue its application dated 7/12/2018, in terms of prayer 7, the procedural way should have been to allow the parties to address the court on that application.

21. To the extent that the court did not avail to both parties the chance to be heard before giving its orders, this court however well intentioned, run into an error which it is bond to correct. That correction need not be pursued on appeal by once brought to the attention of the court, it is the duty of the court, to act *ex-debito justitiae* and correct its own error. In coming to this determination I do appreciate that however clear to me it would have been to me that there was an obligation upon the Applicant and the Act, it was mandatory that I give the parties an opportunity to address me on the point. That is a dictate of

22. On that basis alone, I am inclined to accede to the application for setting aside even though I honestly believe that if indeed the debt was paid in full a subsequent litigation really need to be obviated unless parties have other reasons to litigate over and above the debt.

23. The upshot is that I do allow the Application dated 23/2/2019 with costs to the applicant. That takes back the matter to the status it stood on the 18/12/2018 after the application that instituted the matter stood withdrawn with costs to the Respondents. Let the status quo maintaining as at 17.12.2018 be restored as far as the possession of the suit motor vehicle is concerned.

24. With that determination, I now take the view that the Respondents application dated 15/01/2019 becomes moot and overtaken by events having been grounded on the orders, I have just set aside. The respondent may now exercise the wish by counsel to file a fresh suit if it be so minded.

Dated and **signed** at **Mombasa** this **4th** day of **June 2019**.

P.J.O. OTIENO

JUDGE

Dated and **delivered** at **Mombasa** this **11th** day of**June 2019**.

LADY JUSTICE D. CHEPKWONY

JUDGE

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[1] Per the Court of Appeal in **Kwanza Estates Limited v Dubai Bank of Kenya limited (in liquidation) & another [2016] eKLR**

"A Judge in determining a dispute is not restricted only to the provisions of the law cited by a party. **Subsection (2)** which the appellant relied on cannot be read in isolation from the rest of the section".