



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
CIVIL APPEAL NO. 230 OF 2008

STEPHEN NGARUIYA KANYANJAAPPELLANT

VERSUS

COFFEE RESEARCH FOUNDATION RESPONDENT

The Respondent/Applicant has moved this court by way of a Notice of Motion dated the 8th day of December, 2015 seeking the following orders.

1. Spent.
2. That this Honourable court be pleased to cite and punish the Appellant one Stephen Ngaruiya Kanyanja and his agent Mr. G.G. Muchiri Trading as M/s Fantasy Auctioneers for disobeying and disregarding the lawful Court order granted on the 5th November, 2015 and issued on 13th November, 2015.
3. That consequent to prayer (2) herein above being granted, this Honourable court be pleased to issue Warrants of arrest, to bring the Appellant Mr. Stephen Ngaruiya Kanyanja and the auctioneer, Mr. G.G. Muchiri for committal to jail for disobeying the above stated court order, for such period not exceeding six (6) months or such period as the court may deem fit.
4. That in the alternative and without prejudice to the foregoing, this court be pleased to grant an order for attachment of the property of the Appellant and/or the auctioneer, Mr. G.G. Muchiri, which property be sold to defray the damages occasioned by the continued disobedience of the above mentioned court order.
5. That the cost of this application be borne by the appellant/respondent.

The application is supported by the affidavit of FESTUS OUMA BOLO and it's premised on the grounds set out on the body of the same.

The facts in support of the application are that; by an application dated 9th September 2015 the Respondent/Applicant sought for orders staying execution of judgments and decrees of this court dated the 3rd July 2012 and 5th March 2015, and the decrees of the subordinate court Milimani CMCC No. 13558 of 2004 given on the 5th March 2015 and all consequential orders, pending the hearing and determination of Civil applications nos.NAI 215 of 2015 (UR 178/2015 and NAI 219 OF 2015 (UR 181/2015 in the Court of Appeal Nairobi.

In the same application, the Respondent/Applicant also sought for orders that the appellant, through his agents, M/s Fantasy Auctioneers be

ordered to return and/or release the respondent's motor vehicle Registration number KBL 612G Nissan Ambulance seized on the 29th July, 2015.

That the said application was heard and vide a ruling delivered on the 5th November, 2015 the court ordered, inter alia that the appellant through his agent do release the aforesaid motor vehicle. That in addition to the appellant's and his agent's knowledge of the existence of the court order, they were diligently served on the 16th November 2015 but despite the service, they declined to release the said vehicle claiming that the respondent shall only be given "*release letter*" from their offices and further that, the motor vehicle could only be released on condition that the respondent pays storage charges totaling to Ksh.60,000/=.

That the Appellant's agent M/s Fantasy Auctioneers were on the 20th November 2015 reminded of the express terms of the court order, which was not conditional on the applicant paying any storage charges. That despite knowledge of the court order, the appellant and his agent has declined to obey and comply with the order to release the motor vehicle.

The application is opposed vide a replying affidavit sworn by STEPHEN NGARUIYA KANYANJA and another one sworn by GEORGE GITUGA MUCHIRI ON THE 17TH March 2016.

This court will consider the two affidavits together as the contents are substantially the same.

That the Respondent herein appointed Mr. George Gitonga Muchiri t/a Fantasy Auctioneers to execute warrants of attachment of property of the Applicants in execution of decrees issued on the 3rd July 2012 and 5th March 2015. It is not clear when the applicant's motor vehicle was proclaimed or when it was carried away, but what is not in doubt is that it was attached in execution of the decrees given on 3rd July 2012 and 5th March 2015.

The Auctioneer avers that he has not refused to release the motor vehicle pursuant to the court order but he states that the release of the subject motor vehicle was subject to payment of demurrage fees but blames the applicant for refusing to pay the same. He avers that he has no control over the situation given that he cannot force the storage Company to release it pursuant to the court order and that the storage Company runs legitimate business so long as it is within the confines of the law.

In addition to those common assertions in their affidavits, the Respondent further avers that the reason why execution proceeded in the first place was as a result of the applicant's failure to comply with court orders as pronounced in the judgments of 3rd July 2012 and 5th March 2015. That as a result of the inactions of the applicant, he has been denied his rightful opportunity to enjoy the fruits of his judgment necessitating the use of the auctioneers to proceed with execution in satisfaction of the decrees.

He further avers that to subject him to the orders sought in the instant application or in the alternative, direct him to pay the storage charges, would be double jeopardy on his part. That he has been sickly for a period of two years and has spent most of the time in and out of hospital and to commit him to civil jail will only aggravate his health problems as he has been directed by doctors to avoid stress related work or activities. That the applicant should be ordered to pay the storage charges.

This court has considered all the material before it including the submissions by the parties. The applicant seeks to have the Respondent and the auctioneer M/s George Gitonga Muchiri cited and punished for disobeying and disregarding the lawful court order.

In his replying affidavit, the respondent has deposed that he gave

instructions to the auctioneer to execute lawful decree that had been issued in his favour. That pursuant to the said instructions, the Auctioneer went ahead and attached the applicant motor vehicle registration number KBL 612G, a fact which the auctioneer has not denied in his affidavit.

The Respondent further depones that the auctioneer informs him that he has not refused to release the motor vehicle but the release of the vehicle was subject upon the payment of storage charges.

In his submissions, the Auctioneer argues that he is not a party to the suit and therefore not suited to the claim. I do agree that the auctioneer is not a party to the suit and this court cannot make any orders against him unless he has been joined as a party.

In carrying out execution as he did in this matter, he acted as a lawful agent of the appellant and any issues that may arise between them should not affect the applicant herein. The Respondent has admitted that he is aware of the court order.

The order of the court in its ruling delivered on the 5th day of November, 2015 is very clear that the motor vehicle was to be released forthwith. No conditions are attached to that order.

It is contrary to the court order for the appellant to depose that the Applicant be condemned to pay the storage charges for the motor vehicle to be released. He ought to have obeyed the order first then come back to court to seek clarifications, if any, but he chose not to obey the order treating it like it did not exist.

As the court pointed out in the case of **Hadkinson Vs Hadkinson, (1952) All E.R. 567**, it is plain and unqualified obligation of every person against, or in respect of, whom an order is made by a court of competent jurisdiction to obey it unless and until that order is discharged. The uncompromising nature of this obligation is shown by the fact that it extends even to cases where the person affected by order believes it to be irregular or even void.

Similarly in the case of **Chuck Vs. Cremer (1) (1 Coop. temp. 342)** the court held;

“A party, who knows of an order, whether null or void, regular or irregular, cannot be permitted to disobey it.”

It would be dangerous to hold that the suitors or their solicitors, could themselves judge whether an order was null or valid – whether it was regular or irregular. That they should come to court and not take upon themselves to determine such a question. That the course of a party knowing of an order, which was null or regular, and who ought to be affected by it was plain. He should apply to the court that it might be discharged. As long as it exists, it must not be disobeyed. The Respondent and the auctioneer ought to have come back to court if they had any difficulties in obeying the Court order.

Before I conclude this ruling, I wish to point out that it is unfortunate that the Auctioneer was not enjoined as a party to this application yet he played a very significant role in the process leading to the matters complained off in the application herein but for failure by counsels to join him as party, he is lucky that this court cannot make any orders against him at moment, with regard to the application.

The upshot of this is that the applicant’s application dated 8th December 2015 is hereby allowed. I find the Respondent to be guilty of contempt of court by disobeying the order made on 5th November, 2015.

He is fined a sum of Ksh.50,000/= and in default to serve 30 days imprisonment in jail.

The fine to be paid within 14 days from the date of this order and in default, the Respondent to be arrested immediately and be committed to jail to serve the jail term.

Dated signed and delivered at Nairobi this 19th day of January, 2017.

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LUCY NJUGUNA

JUDGE

In the Presence of

..... for the Appellant

..... for the Respondent