REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 207 OF 2016

1. MILTON MUNENE.....1ST APPELLANT

2. MUNNS ENTERPRISES LIMITED.....2ND APPELLANT

VERSUS

1. VICBRAN CONSULTANTS LIMITED.....1ST RESPONDENT

2. KENYA UNITED STEEL COMPANY (2006) LIMITED....2ND RESPONDENT

RULING

1. The appellants have filed a notice of motion dated 15th December, 2016. They seek stay of proceedings, execution and or enforcement of the orders granted on 22nd April,2016 in Milimani CMCC No. 5059 of 2013 pending the hearing and determination of this appeal. The motion is premised on the grounds that have been listed on its body and the supporting affidavit of the 1st Appellant who is the 2nd Appellant's director.

2. Brief facts are that default judgment was entered in favour of the 1st respondent in CMCC No. 5059 of 2013 against the 2nd respondent. In execution of the decree against the 2nd respondent, the 1st respondent instructed Murphy Auctioneers to attach the 2nd respondent's motor vehicles. Upon the said instructions, the auctioneers engaged the appellants who are in the business of offering storage services. The appellants went ahead to store KBC 920V, KBH 118L and KBP 040J at a cost of KShs. 1,000/= per day for each vehicle. Later, on 19th January, 2016, the respondents recorded a consent setting aside the default judgment. Among the orders of the trial court were that the outstanding storage charges be addressed by the plaintiff and their auctioneer with a rider that in the event they failed to agree, the aggrieved party be at liberty to move the court for appropriate remedy and further that the appellant unconditionally release the vehicles.

3. It is the appellant's gravamen that they were not given an opportunity to be part of the consent and/or their interest factored in yet, the setting aside of the judgment impacted on them. That they stand to suffer substantial loss in the absence of payment of the escalating storage charges and that they are apprehensive that they may be committed to civil jail which will effectively take away their Constitutional right to liberty.

4. James Ngochi Ngugi the advocate in conduct of this matter on behalf of the 1st respondent swore a replying affidavit on 10th February, 2017. He essentially contended that this application is an abuse of court process since the appellants have not obeyed the orders of court arising from the ruling of Hon. Mburu in Milimani CMCC No. 5059 of 2013.

5. The 2nd respondent filed grounds of opposition as follows:

i. That the application is incompetent, void ab initio, has no locus and should be dismissed with costs to the respondents

ii. The application is an abuse of the judicial process and is a mockery of the court.

iii. That the application is brought before court with unclean hands and in outright violation of the court orders.

iv. That the applicants have clearly stated in paragraph 9 of the supporting affidavit that they have no interest in the motor vehicles hence the applicants have no basis in disobeying the court orders which were expressly served on them.

v. That the applicants have not shown what loss they are going to suffer in the event they release the said vehicles.

vi. That the applicants have no right in infringing the defendant's right to property by continuing to hold the said motor vehicles as this is an outright violation of the defendant's constitutional right.

vii. That whatever claim they may have can always be claimed from the party that instructed them.

viii. That the defendant is suffering and continues to suffer notwithstanding the court directing the applicants to release the said motor vehicles.

ix. That the applicants should not be heard unless they comply with the orders of court.

x. That if this application is allowed the defendant will stand condemned to loss of business and for lack of use of the said motor vehicles, irreparable loss and damage and in any event the motor vehicles continue to waste due to rust and lack of care and maintenance.

ix. That this appeal has no chance of success.

6. I have considered the dispositions of the parties and the submissions which were a reiteration therein. In determining the question, the Court exercises its inherent power under Sections 1A, 1B and 3A of the Civil Procedure Act. See **Halsbury's Laws of England 4th Edition Vol. 37 P. 330**, on implication of granting the order of stay of proceedings. The Scholars therein stated as follows:-

"The stay of proceedings is a serious, grave and fundamental interruption in the right that a party has to conduct his litigation towards the trial on the basis of the substantive merits of his case, and therefore the Court's general practice is that a stay of proceedings should not be imposed unless the proceedings beyond all reasonable doubt ought not to be allowed to continue."

In the case of **Global Tours and Travels Ltd Winding Up Cause No. 43 of 2000 (UR)** it was held that:-

"...Whether or not to grant a stay of proceedings or further proceedings on a decree or order appealed from is a matter of judicial discretion to be exercised in the interests of justice. Such discretion is unlimited save that by virtue of this character as a judicial discretion, it should be exercised rationally and not capriciously or whimsically. The sole question is whether, it is in the interests of justice to order a stay of proceedings, and if it is, on what terms it should be granted. In deciding whether to order a stay the court should essentially weigh the pros and cons of granting the order. And in considering those matters, it should bear in mind such factors as the need for expeditious disposal of the case, the prima facie merits of the intended appeal in the sense of not whether it will probably succeed or not but whether it is an arguable one, the scarcity and optimum utilization of judicial time and whether the application has been

brought timeously." (emphasis mine)

7. Therefore, in determining whether or not to grant the order for stay of Proceedings, this Court ought to consider whether or not the motion has been brought timeously and the appeal is arguable. The ruling the Appellant intends to appeal against was delivered on 22nd April, 2016 and this motion was filed on 15th December, 2016. I further note that the appellant filed a notice of motion on 25th April, 2016 after the delivery of the ruling seeking to be admitted as an interested party to tis suit and further seeking stay of the orders sought of 22nd April, 2016. The said application was dismissed vide a ruling which was delivered on 2nd December, 2016. Considering that the appellant's attempt to stay proceedings was dismissed by a ruling on 2nd December, 2016 and this motion filed on 15th December, 2016, I am of the view that this motion has been brought timeously.

8. The next issue is whether the appeal is arguable or not. Among the grounds in the memorandum of the appeal is the trial court failed to direct the payment of storage charges as a condition for release of the attached motor vehicles. Considering that the appellant had been instructed to store the vehicles, his interest accrued therefrom. In my view therefore, he has an arguable appeal. It must be noted that an arguable appeal must not be one that must succeed however, it is one that can only be determined on merits. Would this appeal be rendered nugatory in the event the orders sought are not granted? In my view the answer is in the negative. I say so because, in the event the appeal succeeds he shall follow the respondents for payment of the storage charges, and in any event, the longer the vehicle are held the more will the storage charges go up which is not in the interest of any party.

9. There is another issue in this motion. The court on 19thJanuary, 2016 set aside the ex parte judgment. Subsequently on 4th March, 2016, orders were issued that the auctioneer do release vehicles KBC 920V, KBH 118L and KBP 040J forthwith without any conditions and in default the officer commanding Changamwe police station to ensure the order is complied with. It was further ordered that auctioneer was in contempt of the court orders. From the dispositions herein there is no doubt that the applicant/ appellant herein is aware of the court order but has not made good the same. I am cognizant of the fact that the High Court is divided on the issue of knowledge vis a vis personal service of court order.For example in **Hon. Basil Criticosv. The Hon. Attorney General & 8 Others (2012) eKLR,** where Lenaola Jputs the knowledge of a court order above personal serviceapparently departing from his position in Kariuki's case. He stated:

> ***"The issue of knowledge of orders as being sufficient was until recently, alien in our jurisprudence. in Kariuki and Others –vs- Minister for Gender, Sports, Culture and Social Services and 8 Others, (2004) 1KLR 588, it was held.***
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> ***"...but in our law, service is higher than knowledge and since the service here was frustrated...I shall hold in accord with the existing law that there was no service."***

While on the other hand,Majanja J puts personal service higher than knowledgein**Mike Maina Kamau v. Hon. Franklin Bett and 6 Others (2012)eKLR**stated that;

> ***"The law and practice concerning contempt of court has been settled in this country(see Isaac Wanjohi and Another –vs- Rosalind Macharia Nairobi HCCC No.450 of 1995 (unreported) per Bosire-J, and Wildlife Lodges Limited –vs- County Council of Narok and Another Nairobi HCCC NO. 1248 of 2003 (unreported) per Ojwang Ag. –J). By virtue of Section 5(2) of the Judicature Act****, the law applicable is to be found in the* ***England Supreme Court Practice Rules. Order 52 Rule 3 (1) of the Supreme Court Practice Rules makes it mandatory for the contemnor to be served and failure to do so renders the application defective..."***

10. It is however worth noting that in the instant case, there is no contention as to whether the appellant knew of the court order or not since the knowledge is admitted. It follows therefore that the proper thing to have done was to comply then seek redress by filing this motion but only after complying with the court order since court orders are not issued in vain. On this point I am fortified by the decision in

Hadkinson v. Hadkinson 2 ALL ER 1952 P. 569 where it was held:

> ***"It was the plain and unqualified obligation of every person against, or in respect of whom an order was made by a court of competent jurisdiction to obey it unless and until it was discharged."***

11. See also **Kenya Union of Savings and Credit Cooperatives (KUSCCO) Limited v. Nairobi City Council (now Nairobi City County & 2 others [2015] e KLR** where it was held as follows:

> ***Court orders, it is my considered view, are not made in vain and are meant to be complied with. If for any reason a party has difficulty in complying with court orders the honourable thing to do is to come back to court and explain the difficulties faced by the need to comply with the order. Once a Court order is made in a suit the same is valid unless set aside on review or on appeal. In Econet Wireless Kenya Ltd vs. Minister for Information & Communication of Kenya & Another [2005] 1 KLR 828 Ibrahim, J (as he then was) stated:***
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> > ***"It is essential for the maintenance of the rule of law and order that the authority and the dignity of our Courts are upheld at all times. The Court will not condone deliberate disobedience of its orders and will not shy away from its responsibility to deal firmly with proved contemnors. It is the 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 an order believes it to be irregular or void".***

12. ***This position was confirmed by the Court of Appeal in Refrigerator & Kitchen Utensils Ltd. vs. GulabchandPopatlal Shah & Others Civil Application No. Nai.39 of 1990.***

> ***In Wildlife Lodges Ltd vs. County Council of Narok and Another [2005] 2 EA 344 (HCK) the Court expressed itself thus:***
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> ***"It was the plain and unqualified obligation of every person against or in respect of whom an order was made by a Court of competent jurisdiction to obey it until that order was discharged, and disobedience of such an order would, as a general rule, result in the person disobeying it being in contempt and punishable by committal or attachment and in an application to the court by him not being entertained until he had purged his contempt. A party, who knows of an order, whether null or valid, regular or irregular, cannot be permitted to disobey it..."*** [Emphasis own]

13. In the premises aforesaid, I find and hold that the application dated the 15th December, 2016 has no merits. The same is dismissed but with no orders as to costs.

Dated, signed and delivered at Nairobi this 16th day of March, 2017.

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L NJUGUNA

JUDGE

In the presence

…… ***For the 1st Appellant***

…….*For the 2nd Appellant*

……..…. For the 1st Respondent

…….....…. For the 2nd Respondent